Supreme Court, U.S.
FILED
JUL 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-111

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ALAN R. STONEMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BROWN & MARTINEZ
JOHN BROWN
Suite 1200
Oxnard, California 93030
(805) 983-2238
Attorneys for Petitioner,
Alan R. Stoneman

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

QUESTIONS PRESENTED

1. Whether the discretionary aspect of Federal Rule of Criminal Procedure, Rule 23(b), as arbitrarily exercised in this case by the trial court in allowing 11 jurors to render a verdict against Petitioner, when his trial started with an original cross-section of 12, resulted in an injustice to petitioner and an unconstitutional denial of his substantive right to the unanimity of the original representative cross-section of 12 members?

2. Was Petitioner denied his constitutional rights to seek Justice and to compulsory due process when the government objected to, and the trial court concurred and refused, to allow any inspection of the complete alcoholic records of the government's only witness against Petitioner, when partial information contained therein was first brought to the jury's attention by the government and when the complete records could have shed light upon the condition of the state of mind and memory of that witness and could have revealed possible admissions concerning his dealings and motivations during the timeframe to which he was testifying, resulting in an arbitrary denial of Petitioner's right to a full disclosure of the Truth?

3. Was Petitioner's conviction, based upon acts for which he was acquitted, a confirmation that the jury was unable to properly separate the accusations against Petitioner and his co-defendant, so that the jury's verdict was based upon guilt by association. Thereby, demonstrating the prejudicial rub-off and injustice to Petitioner by being forced into being co-tried with Smith?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I	
AMENDED F.R.C.P., RULE 23(b) WAS IMPROPERLY PROMULGATED AND ITS CONSTITUTIONALITY "DETERMINED" BY IMPROPER RELIANCE ON INAPPLICABLE CASE LAW	8
II	
DENYING PETITIONER ACCESS TO FULL RELEVANT AND MATERIAL INFORMATION REGARDING THE GOVERNMENT'S ONLY WITNESS, WHO LINKED PETITIONER TO THE UNLAWFULNESS OF THE FICA RECOVERY SCHEME, DEPRIVED PETITIONER JUSTICE AND COMPULSORY DUE PROCESS	14

Table of Contents

Page

III

THE JURY WAS NOT ABLE TO PROPERLY SEPARATE THE EXTENSIVE EVIDENCE IN THIS CASE, AS PETITIONER WAS ACQUITTED OF THE VERY ACTS FORMING THE BASIS OF HIS ALLEGED PARTICIPATION IN THE CONSPIRACY, WHICH FACT, COUPLED WITH THE CONFUSING JURY INSTRUCTIONS ON THE LAWS OF CONSPIRACY, ESTABLISH THE REMARKABLE PREJUDICE THAT RUBBED-OFF ONTO PETITIONER IN HIS BEING FORCED INTO A CO-TRIAL WITH SMITH 18

CONCLUSION 24

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Third Circuit A-1

Appendix B. Petition for Rehearing Is Denied ... B-1

Appendix C. Opinion of the United States District Court for the Middle District of Pennsylvania C-1

Order — Denying Motion for Arrest of Judgment; Motion for Judgment of Acquittal is Denied and Motion for a New Trial is Denied C-18

Appendix D. Verbatim Quoted Statutes D-1

TABLE OF AUTHORITIES

Cases

	Page
Braham v. State, 571 P.2d 631 (Alaska, 1977), cert. den. 436 U.S. 910 (1978)	17
Davis v. Alaska, 415 U.S. 308 (1974)	17
F.C.C. v. Schreiber, 381 U.S. 279, 290-291 (1965)	14
Patton v. United States, 281 U.S. 276, 298, 50 S.Ct. 253 (1930)	10
United States v. Armstrong, 621 F.2d 951 (9th Cir. 1980)	19
United States v. Bambino (sic), 598 F.Supp. 646 (D.N.J. 1984)	8, 11
United States v. Gambino, 598 F.Supp. 646, 660 (1984)	11, 12, 13
United States v. Lowell (sic), Nos. 84-1441, 1459, 1460, 1463, 1365 (2d Cir. December 13, 1985), *cert. denied,* 54 U.S.L.W. 3562	8, 12
United States v. Richard Lowell Stratton, 779 F.2d 820 (2d Cir. 1985)	8, 9, 11, 12, 13
United States v. Scalzitti, 578 F.2d 507 (3d Cir. 1978)	9, 11
United States v. Spock, 416 F.2d 165 (1st Cir. 1969)	24
United States v. Taylor, 498 F.2d 390, 392 (9th Cir. 1974)	14
United States v. Taylor, 507 F.2d 166 (5th Cir. 1975)	10
Washington v. Texas, 388 U.S. 14, 19 (1967)	17

Table of Authorities

Cases

	Page
Williams v. Florida, 399 U.S. 78 (1970)	9, 12
Williamson v. United States, 310 F.2d 192, 198 (9th Cir. 1962)	23

Constitution

United States Constitution, Sixth Amendment ..	17

Federal Regulations

Code of Federal Regulations, Title 42, Section 2.61	14
Code of Federal Regulations, Title 42, Section 2.63	5, 16

Rules

Federal Rules of Criminal Procedure, Rule 23(b)	i, 1, 6, 8, 9, 11, 12, 14
Federal Rules of Criminal Procedure, Rule 30 ..	1
Rules of the United States Supreme Court, Rule 19.4	1

Statutes

United States Code, Title 18, Section 371.....	2
United States Code, Title 18, Section 1341.....	2
United States Code, Title 18, Section 1952(a)(3)	2
United States Code, Title 18, Section 3771.....	13
United States Code, Title 28, Section 1254(1)...	2

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ALAN R. STONEMAN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Alan R. Stoneman respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 28, 1986. Petitioner respectfully adopts and joins, pursuant to Rule 19.4 of the Rules of the Supreme Court, in the Petition for Writ of Certiorari filed by his co-defendant, William Smith, as that Petition relates to Federal Rules of Criminal Procedure, Rule 23(b) and Rule 30.

OPINIONS BELOW

The opinion of the court of appeals is now published at 789 F.2d 196. A copy of the court's opinion is attached as Appendix A. By order dated May 23, 1986, the court of appeals denied a petition for rehearing. Appendix B. The trial court's opinion and order denying Petitioner's post

trial motions for new trial and/or for acquittal, dated October 18, 1985 is attached as Appendix C. Verbatim quoted Statutes as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 28, 1986. A timely petition for rehearing was denied on May 23, 1986. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Petitioner and four other individuals were charged with conspiracy, [18 U.S.C., Section 371], and fifteen substantive violations of the Interstate Transportation and Aid of Racketeering and Mail Fraud statutes, [18 U.S.C. sections 1952(a)(3) and 1341]. The sixteen-count indictment charged a single massive scheme to obtain, through bribery, lawful contracts to recover FICA tax overpayments withheld by governmental employers from their employees' salaries. The Government's theory of the scheme, advanced throughout trial, included contracts for Allegheny County, the City of Pittsburgh and a state contract for the school district employees.

All but Petitioner and Smith pled guilty as part of a plea bargain agreement with the Government. Petitioner did not plea bargain. He refused to "deal" since, in Truth, he at no time knew that his client, John Torquato, was utilizing unlawful means to obtain the lawful FICA recovery contracts in Pennsylvania. Petitioner, in good faith, believed that Justice would prevail and his innocence proved. However, the Truth of his innocence was buried by being forced, by the government's insistence, to be co-tried with Smith, Torquato's Pennsylvania attorney, Un-

like Petitioner, Smith was privy to many of the conversations Torquato had with the various involved public officials pertaining to the school district contract. In Truth, Petitioner was never privy to any of these dealings. Neither was he physically present during any of these negotiations. And, unlike Smith, he was never sent any correspondence informing him of their true substance or unlawful nature.

The co-trial lasted three months and consumed more than 7,000 pages of testimony from 106 witnesses. Of these, the government called 22, 19 of which dealt solely with the extensive dealings of Smith and Torquato relating to the school district contract. The government conceded that Petitioner had no involvement with this contract other than having sent David Herbert 1500 shares of COM-MAX stock on January 22, 1984. In fact, his only alleged participation in Torquato's scheme was complying with his client's seemingly procedural wishes for him to send stock or stock options to four individuals: Scott O'Donnell, David Herbert, Ronald Schmeisser and Robert Stone. He was also procedurally requested to send Robert Stone, Esq., a check for $6,374.86 which he was told was simply Mr. Stone's fee for legal services rendered to Torquato. Significantly, Robert Stone was subsequently indicted, separately tried and acquitted of any unlawful acts in this matter.

Petitioner called only 19 witnesses, including himself. Half of whom not only confirmed his lack of knowledge *re* the ulterior and undisclosed motives of Torquato's scheme but that his acts were based solely upon the compliance of the seemingly innocent procedures his client requested of him and of the mandates of California State laws by which Petitioner's actions were governed. The other half of these witnesses all testified on June 4, 1985, as to Petitioner's honorable and forthright character. In spite of petitioner's acquittal of all of the substan-

tive counts regarding the foundational acts for the conspiracy (especially Count 8), petitioner was found guilty of the conspiracy count. Smith was convicted of conspiracy and eight substantive counts.

The only evidence that Petitioner had "guilty knowledge" and intent to participate in any unlawful actions, while he felt he was simply performing acts that any lawyer would normally perform for a small businessman client, came from Torquato, the government's main witness. Torquato was the only witness out of the 106 witnesses, who testified that Petitioner had guilty knowledge and unlawful intent while his otherwise innocent acts were performed. Curiously, while Smith and Torquato were to each receive $2,000,000.00 from their scheme, Petitioner was to receive nothing. He was to receive his normal retainer for his legal services rendered, the sum of $500.00 per month.

During trial, Petitioner requested the release of Torquato's alcoholic records, as Torquato admitted he was an alcoholic during the pertinent times his scheme was being effected and when he was having his conversations with Petitioner. He further testified that he sought medical treatment and told the jury that he was diagnosed as being a "delta-alcoholic," a functioning alcoholic, during these times. Torquato, under penalty of perjury, fully testified as to his diagnosis, his treatment and rehabilitation while within the program.

Yet, by his own further testimony, Torquato totally denied each and every symptom medically associated with delta-alcoholism. This created questions as to his true alcoholic condition that could not be properly answered through cross-examination. These questions were further denied their answers by the trial court's refusal to conduct even an in-camera inspection before refusing disclosure of those records. Since Torquato's testimony was the

only direct evidence of Petitioner's guilty knowledge and intent, it was absolutely essential to the Truth and the establishment of Petitioner's innocence that all relevant and material information be presented.

Despite the fact that in open court Torquato expressly waived his privilege to those records, the trial court refused to conduct even an in-camera inspection to ascertain the nature of the data contained therein. Yet, it ruled that Petitioner failed to demonstrate "good cause" for the release of the records. And, that the exceptions to 42 C.F.R. Section 2.63 did not apply because Torquato did not testify as to his communications within the program. Petitioner claimed such ruling denied him of his constitutional right to compulsory due process.

The United States Court of Appeals for the Third Circuit held that apart from a lack of good cause shown, the exceptions to 42 C.F.R. Section 2.63 did not apply because Torquato did not testify as to his communications within the program. Appendix A, at A-20. Petitioner claims that such rulings denied him his constitutional right to compulsory due process.

During the presentation of the government's case-in-chief and prior to any independent judicial determination that Petitioner was linked to the single conspiracy charged in the indictment, the trial court, over Petitioner's continuous objections, allowed into the record numerous highly prejudicial statements made by others outside his presence. These highly inflammatory, inherently prejudicial, casual admissions and bragadocious statements were not "in furtherance" of the conspiracy. They did, however, consume the majority of the court's time. They helped bury the true nature of Petitioner's actions in carrying out his client, Torquato's, procedural requests. And, they helped confuse the jury. The jury's confusion was further heightened by the convoluted man-

ner in which the charges on conspiracy were given them. The jury's confusion on these charges is in the record. They had to ask for clarification each time the trial court reinstructed them on the laws of conspiracy. Moreover, during the jury's deliberations, they had to repeatedly ask for clarification of the evidence and the jury charges as a whole.

Following the final charges to the jury and after three full days of deliberations, one juror was dismissed due to injuries she received in a serious traffic accident. The trial court overruled Petitioner's motion for mistrial which he made following his discovery of the loss of Mrs. Stoller, an important juror in his case. The trial court overruled Petitioner's motion for mistrial because it chose to use Federal Rule of Criminal Procedure, Rule 23(b). Over Petitioner's objection, the court allowed the remaining 11 jurors to continue deliberations without Mrs. Stoller's input, considerations and effect on the other jurors. The remaining 11 rendered their verdict against Petitioner on only the conspiracy count. Yet, they acquitted him of all the substantive counts which comprised the conspiracy count, further illustrating the confusion they experienced in Petitioner's convoluted co-trial.

The court of appeals, in holding that the verdict was supported by substantial evidence, relied upon the trial court's similar finding. Appendix A, at A-22. However, the trial court denied Petitioner's post-trial motions, relying upon certain testimony of Janice Kincaid. The trial court stated that she testified that Petitioner participated in certain conversations in which "bribes" were discussed. And, that Petitioner knew of a $1000 "bonus" she received as reimbursement for her check to the Pennsylvania Republican State Committee. Appendix C, at C-4-5. Such reliance on Kincaid's testimony is erroneous, misplaced and only demonstrates the difficulty the trial

court and appellate court had in following the evidence in this case. It can therefore reasonably be assumed that the jury suffered the same difficulty, as such evidence of Kincaid's testimony is non-existent in the record.

Kincaid DID NOT testify that "bribes" were discussed in front of Petitioner. She testified that payment of certain vague expenses were discussed in Petitioner's presence. And, that Torquato discussed the use of a series of cashier's checks to pay those expenses. Before this discussion, and out of Petitioner's presence, Torquato told *her* he had to pay for the contracts that were obtained in Pennsylvania. She further testified that she only assumed that Petitioner had that same knowledge and that she assumed Petitioner knew that the "expenses" related to the payment for the contract. Torquato even testified and confirmed the fact that the payment of "bribes" was never discussed in Petitioner's presence. Kincaid testified that Petitioner did not know the specific nature of the $1000 "bonus" she received. She admitted that she never discussed the nature of that check with Petitioner. She admitted that she only assumed Petitioner knew the nature of that "bonus."

The trial court's characterization of Kincaid's testimony as constituting substantial evidence is error. And, this error was only compounded by the court of appeals in its reliance on that finding.

The court of appeals' decision amply demonstrates its own misunderstanding and confusion as to the evidence presented. Their decision contains a myriad of errors, which only corroborate Petitioner's contention, raised both in his pre-trial and post-trial motions for severance, that he would, and did, suffer remarkable prejudice in being forced to be co-tried with Smith. The jury was simply not capable of properly separating the extensive evidence in this case which consumed more than 7,000

pages of transcript given over a three month period of time by 106 witnesses. Had Petitioner been separately tried, many of the prejudicial hearsay statements that were admitted in his co-trial would not have been admissible against him. Several other examples of the improper and misleading statements made by the court of appeals *re* the evidence presented are more fully discussed hereinbelow.

REASONS FOR GRANTING THE WRIT

I

AMENDED F.R.C.P., RULE 23(b) WAS IMPROPERLY PROMULGATED AND ITS CONSTITUTIONALITY "DETERMINED" BY IMPROPER RELIANCE ON INAPPLICABLE CASE LAW.

In this case, Petitioner's trial started with an original cross-section of 12 jurors yet ended with a cross-section of only 11. After three full days of deliberations, one juror, Mrs. Stoller, was incapacitated in a traffic assault and was forced to discontinue deliberating as a juror. Petitioner moved for a mistrial, but his motion was denied. The court then used Rule 23(b) in allowing the remaining 11 jurors to render a verdict against Petitioner. Petitioner objected to this ruling, but his objections were overruled. He claimed that the unanimity of the original cross-section of his 12 jurors, upon which he relied in deciding his fate and with whom he placed his confidence in their arriving at a Fair and Just Verdict, would thereby be lost. At no time did Petitioner ever consent to 11 jurors rendering a verdict in his case.

In ruling upon Petitioner's constitutional attack on Rule 23(b), the federal court of appeals relied on two cases: [*United States v. Bambino* (sic), 598 F.Supp. 646 (D.N.J. 1984) and *United States v. Lowell* (sic) *United*

States v. Stratton, 779 F.2d 820 (2d Cir. 1985)]. It claimed these cases "considered the constitutionality of the discretionary part of Rule 23(b)." Appendix A, at A-18. It went on to note this Court's holding in *Williams v. Florida,* 399 U.S. 78 (1970), in which a six member jury was constitutionally permitted. However, this is not a *Williams* case, nor were the issues herein raised, decided or even considered by this Court in *Williams.*

As more fully discussed herein-below, these cases did not discuss the novel issues raised by Petitioner, and consequently this is a case of first impression. The constitutional issues raised by Petitioner have never before been considered nor decided. These issues raise such an important federal question that a ruling by this Court is essential to settle the constitutionality of the discretionary aspect of Rule 23(b) and its material impairment of a defendant's constitutional substantive rights.

Even conceding, for sake of argument, that there is no "magic" in the number 12, as it relates to the initial number of jurors necessary to comprise a constitutional jury, there is an import to the cross-section that compromises the validity of that jury, whether that number be 6, 9 or 12. In *Williams,* the defendant started his trial with 6 jurors and presumably selected his cross-section of jurors accordingly. Mr. Williams did not lose the unanimity of his selected original cross-section. Petitioner did. Clearly, the unanimity of the original jury's nature was altered when an important juror was suddenly subtracted in the midst of deliberations. The Court of Appeals for the Third Circuit had recognized this fact when it pointed out in its prior holding in *United States v. Scalzitti,* 578 F.2d 507 (1978):

> "... Unanimity is an indispensable element of a federal jury trial because it serves the purpose of insuring that the views of a cross-section of community are

> brought to bear fully on the issues to be decided at trial."

Petitioner has a constitutional substantive right to the unanimous vote of the original cross-section of jurors that he selected in starting his trial. This novel issue is separate and distinct from a unanimous vote of the remaining jurors. Such a right to the unanimity of the original cross-section was recognized in *United States v. Taylor,* 507 F.2d 166 (5th Cir. 1975), which reversed a conviction rendered by a jury of 11 where the trial started with 12. Therein it was held:

> "To uphold a verdict announced after one juror has died deprives a criminal defendant of the very real benefit of reconsideration and a change of mind or heart."

This vital and important concept of unanimity of the original cross-section was recognized by this Court in *Patton v. United States,* 281 U.S. 276, 298, 50 S.Ct. 253 (1930) in which it was held:

> "Not only must the right of the accused to a trial by constitutional jury be zealously preserved but the *maintenance of the jury as a fact finding body* in criminal cases *is of such importance* and has such a place in our tradition that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had *in addition to the express and intelligent consent of the defendant.*" [emphasis added].

Under the presumption of innocence guaranteed by our Constitution, Petitioner must be given the benefit of any doubt as to any possible prejudice he may have suffered by the loss of Mrs. Stoller, his 12th juror. It cannot be stated with any reasonable certainty what her heart-felt input, considerations and observations were. And,

whether or not she felt the government proved its case against Petitioner beyond a reasonable doubt. However, Petitioner was prejudicially deprived of the very real benefit of her consideration and opinions. And, the effect of her input on the other jurors, which is inherent in Petitioner's most important constitutional substantive right to trial by jury. The Court of Appeals for the Third Circuit recognized the importance of this aspect of the jury system when it further observed in *Scalzitti, supra*:

> "Unanimity serves to effectuate the purpose of the jury system by promoting the *full expression of the views of all members of the jury and by insuring that those views are taken into account as fully and thoroughly as possible in reaching a verdict* . . ." [emphasis added].

Although the Third Circuit has previously observed and followed the Constitutional mandates pertaining to a defendant's substantive right to be tried by the original cross-section of jurors selected, in this case, it relied on *United States v. Bambino* (sic), *supra,* and *United States v. Lowell,* (sic: *United States v. Stratton*), *supra,* which it believed laid to rest the constitutional issues raised by Petitioner. However, those cases did not so hold!

The court in *United States v. Gambino,* 598 F.Supp. 646, 660 (1984), merely observed that the trial court utilized the procedure set forth in Rule 23(b) after it had made its determination that just cause existed for removal of a juror. The defendants therein wanted to substitute an alternate juror to replace the excused juror. It was therein pointed out that the purpose and intent of the 1983 amendment to Rule 23(b) was to determine the *procedure* to be used in dealing with a situation involving the replacement of an excused juror after deliberations had been underway. Petitioner's case had nothing to do with the replacement of a juror, as there were no available

alternates. The *Gambino* court specifically stated at p. 661:

> "Finally, counsel for the defendants, in urging that this court proceed to substitute an alternate, *did not attack Rule 23(b)*. Thus *the record is barren of any argument by defense counsel that somehow Rule 23(b) was flawed or faulted. Certainly, it cannot now be contended that there is any imperfection, constitutional or otherwise,* in the procedure permitted under Rule 23(b)." [emphasis added].

For the court of appeals to have therefore held that *Gambino* held Rule 23(b) constitutional, is but a misleading and improper bootstrap technique to determine such an important novel federal question of first impression that, as herein, affects Petitioner's constitutional substantive rights. *Gambino* simply held that the District Court followed the procedure set forth in Rule 23(b). It did not hold the rule constitutional. In fact, it specifically observed that there had been no constitutional attack made. It stated that it would not therefore entertain any such issue on appeal!

Likewise, the court's reliance on *United States v. Lowell* (sic), *supra,* is misplaced. Although nowhere has that case been located at the citation given or at any other citational reference, the case of *United States v. Richard Lowell Stratton* was located at 779 F.2d 820. The *Stratton* case merely involved and discussed the appropriate number of jurors which constitutes a constitutional jury. It relied upon and discussed the very issues raised and resolved in the *Williams* case. *Stratton* did not deal with the issues raised by Petitioner. Petitioner is not claiming that a constitutional jury requires the magic number of 12 or any more than 6. What Petitioner is contending is that when a trial starts with a given number of jurors, between 6 and 12, that number then becomes magic because a

reduction of that number destroys the unanimity of the verdict, by virtue of a loss of the original cross-section of the community from which the jury was originally selected. The balance of the representative cross-section of the community in which the case is tried is unconstitutionally altered. *Stratton* did not discuss the fact that when a juror is lost during deliberations, that the balance of the original cross-section is thereby lost or destroyed. Therefore, *Stratton,* like *Gambino,* does not stand for the proposition cited by the court of appeals as these cases did not deal with the constitutional issues raised by Petitioner.

The burden on judicial economy would not have been outweighed by Petitioner's constitutional right to have had a mistrial declared, as he requested. Since, if he had been tried separately, as he repeatedly requested, his trial could not have lasted more than approximately two weeks. Especially, when considering that the extensive time consumed in Petitioner's co-trial primarily dealt with issues of which Petitioner had no involvement. The co-trial primarily dealt with the scheme of Smith and Torquato pertaining to their school district contract. The brevity of a separate retrial for Petitioner, can be gleaned from the fact that the subsequent separate trial of Robert Stone Esq., wherein Stone was acquitted of extortion for having accepted the 1500 shares of COM-MAX stock and the check for $6,374.86 which Torquato told Petitioner to send him, only lasted approximately two weeks! Nevertheless, the principle of judicial economy should not take precedence over one's basic constitutional right to seek Justice.

Although 18 U.S.C., Section 3771, empowers this Court with rule making authority, that authority is limited to rules affecting procedure — not substance. As hereinabove pointed out, the rights of Petitioner that were

affected were not merely procedural but substantive. Petitioner is mindful that while a rule's constitutionality is considered by this Court in deciding whether to promulgate it, this Court cannot nonetheless, anticipate every constitutional objection to that rule. This fact underlies and rationalizes this Court's holding in *F.C.C. v. Schreiber,* 381 U.S. 279, 290-291 (1965):

> "Where rights secured by the constitution are involved, there can be no rule making or legislation which would abrogate them."

As pointed out, Petitioner's constitutional substantive rights were materially affected by the trial court's application of Rule 23(b). As was pointed out in *United States v. Taylor,* 498 F.2d 390, 392 (9th Cir. 1974):

> "[A] waiver of jury trial, even the waiver of one juror, is the waiver of a basic and important right."

It can be inferred that this Court merely overlooked the nature of the right which it sought to affect in amending Rule 23(b). However, for the sake of Justice, the possibilities of misuse of Rule 23(b) ought to be re-examined by this Court.

II

DENYING PETITIONER ACCESS TO FULL RELEVANT AND MATERIAL INFORMATION REGARDING THE GOVERNMENT'S ONLY WITNESS, WHO LINKED PETITIONER TO THE UNLAWFULNESS OF THE FICA RECOVERY SCHEME, DEPRIVED PETITIONER JUSTICE AND COMPULSORY DUE PROCESS.

In assessing whether "good cause" exists in deciding to disclose otherwise privileged information pursuant to 42 C.F.R. Section 261, public interest and need for disclo-

sure is to be weighed against the injury to the patient, the physician-patient relationship and the treatment services that could result upon unconsented disclosure. However, there was no such injury here to protect, as Torquato clearly and unequivocally waived, in open court, any such interests. The court of appeals, however, opined that it was the public's interest in maintaining confidentiality that needed protection! And that *this* public interest outweighed the need for disclosure. Appendix A, at A-20. However, the statute states that the public's interest *is* for disclosure. And that *this is* the interest that must be weighed against the patient's interest for non-disclosure! Which was not. Here, the patient waived his interest. Yet, the court of appeals impliedly held that one cannot waive his own privilege. Such a ruling of law is untenable and is so contrary to axiomatic case law that same needs no citation.

The search for Truth and Justice and Petitioner's need for disclosure of all relevant and material information which could have shed light on Torquato's state of mind and memory during the pertinent time-frame of his scheme, clearly should have prevailed in the weighing test. And, the scales of Justice clearly tipped in Petitioner's favor for disclosure.

Assuming arguendo that the search for Truth and Justice, in the face of Torquato's express waiver of his privilege of non-disclosure, is insufficient to establish good cause, the trial court failed to provide Petitioner the opportunity to make clearer showing of good cause by not conducting an in-camera inspection as Petitioner requested during trial. The court of appeals failed to comment or justify this inaction by the trial court as Petitioner requested.

The court of appeals assumed, without even having reviewed the records themselves, that they "would pro-

vide little new material that could be used to impeach the witness's credibility". It moreover assumed that the information would have but "marginally impugn[ed]" Torquato's credibility. Appendix A, at A-21. It would appear that this Court must restate that our Justice system is based upon the search for Truth via facts. Not what Truth is assumed or conjectured to be. Otherwise, where will such assumptions stop being made? Will it get to the point of asking why bother going through a trial, when the court system could simply assume whether a defendant is guilty or innocent?

The appellate court concluded that Petitioner failed to establish sufficient good cause for the release of the records, despite the fact that the government first opened the door, in the jury's presence, to their contents. It further opined, based on some more assumptions and conjecture, that the exceptions to 42 C.F.R. Section 2.63 did not apply. To wit: that Torquato did not testify as to his communications while in the rehabilitation program and that the records did not contain any objective data. Appendix A, at A-20. The court's comment that Torquato did not testify as to his communications, is but confirmation that the evidence in this case was difficult to follow. If the time were taken to search the record, the Truth would surface and the portions of Torquato's testimony concerning his diagnosis which was COMMUNICATED to him while in the program, the nature and extent of his treatments while in the program and his prognosis COMMUNICATED to him while in the program would be revealed. For the court of appeals to conclude that "no communications were testified to", makes one wonder which definition of "communication" the court of appeals used? Clearly, not the standard and common use definition. Otherwise, the court could not have made such a statement.

Assumptions and conjecture had to have been the only basis for the court's conclusion that those records did not contain "objective data", as there was never any in-camera inspection. The only ones who knew what information those records contained were Torquato and most probably the government, since it was working hand-in-hand with its main witness and was the only one that strenuously objected to having its main witness impeached or otherwise discredited by them.

The court of appeals' ruling in this matter is contrary to this Court's holding in *Washington v. Texas*, 388 U.S. 14, 19 (1967) in which it was held:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present the defendant's version of the facts as well as the prosecution's, to the jury so it may decide where the truth lies.

The court of appeals summarily dismissed Petitioner's claim that he was denied his contitutional right to compulsory due process. Rather, it merely discussed and concluded that Petitioner's "right of cross-examination was not impaired". Appendix A, at A-21. Such an analysis, or lack thereof, fails to follow this Court's distinction between a defendant's right to confrontation and the right to compulsory due process. *Davis v. Alaska,* 415 U.S. 308 (1974). Therein, this Court held that the two rights are clearly distinguishable and that the Sixth Amendment guarantee of compulsory due process is one of the most basic ingredients of "due process of law". And, that this constitutional right is equally applicable to the production of documentary evidence. *Braham v. State*, 571 P.2d 631 (Alaska, 1977), *cert. den.* 436 U.S. 910 (1978).

This Court must re-advise the court of appeals of the distinction between these two rights and that Petitioner's

constitutional right to compulsory due process was prejudicially denied by the court's improper adherence to a Legislative statute, which should have taken back-seat to Petitioner's constitutional rights. Significantly, After the government first opened the door to these records by first bringing to the jury's attention partial information contained in those records which was favorable to its case, Petitioner had need of the greatest latitude to present all relevant and material evidence so that Truth and Justice could be Wisely dispensed.

Such evidence could have demonstrated the basis for Torquato's inherently incredulous testimony, and explained why he was able to materially alter his testimony in the subsequent trial of Robert Stone, Esq., who was acquitted for taking that which Torquato claimed in Petitioner's trial to have been a bribe and for which Petitioner was convicted! This Court, for the sake of Justice, must take judicial notice of these salient new facts.

III

THE JURY WAS NOT ABLE TO PROPERLY SEPARATE THE EXTENSIVE EVIDENCE IN THIS CASE, AS PETITIONER WAS ACQUITTED OF THE VERY ACTS FORMING THE BASIS OF HIS ALLEGED PARTICIPATION IN THE CONSPIRACY, WHICH FACT, COUPLED WITH THE CONFUSING JURY INSTRUCTIONS ON THE LAWS OF CONSPIRACY, ESTABLISH THE REMARKABLE PREJUDICE THAT RUBBED-OFF ONTO PETITIONER IN HIS BEING FORCED INTO A CO-TRIAL WITH SMITH.

Petitioner suffered remarkable prejudice because of the extensive testimony concerning the Pennsylvania activities of Smith and Torquato that rubbed off onto him

thereby rendering him guilty of conspiracy by mere association with others. As is clear from a review of the extensive evidence in this case, of the total 106 witnesses who testified, only 20 would have testified in Petitioner's case had he been tried separately. The resultant prejudice to Petitioner in being denied a separate and Fair trial clearly outweighed the issue of judicial economy. *United States v. Armstrong,* 621 F.2d 951, 954 (9th Cir. 1980).

A majority of those 106 witnesses testified as to the school district contract that Smith and Torquato were seeking. This contract was the gravamen of the government's case. Testimony, alone, from the many public officials involved in this contract, consumed approximately four weeks of court time. In terms of probabilities, the jury could not have been expected to compartmentalize and separate the evidence as it related to each defendant. The confusion can be further gleaned from the trial court's own difficulty in properly following and separating the evidence, from the government's consolidated brief in response to Petitioner's opening brief on appeal which confused the evidence and arguments of each separate defendant and, from the appellate court's own difficulty in properly following and separating the evidence.

The fact that the jury was confused was further highlighted by the extremely confusing jury instructions given them by the trial court pertaining to the laws of conspiracy. Many times during their deliberations, the jury attempted to seek clarification on these charges. They also requested clarification on the evidence that was presented.

Whether the allegation of conspiracy against Petitioner was made in "good faith", and thereby a "sufficient reason for trying the conspiracy and all substantive offenses together", Appendix A, at A-22, is seriously questionable. As the record reveals, Petitioner was not going

to be indicted. Petitioner's interview with the FBI on September 17, 1984 turned out to be an evaluation to determine whether or not he would be charged in this case. However, FBI agent Brinkley admitted during trial that before giving his interview, Petitioner was told only that he was interviewed "as a witness" in the investigation of Torquato, his client. Torquato's then-attorney instructed Petitioner to observe the attorney-client privilege and not offer any information to the FBI. Because Petitioner did not volunteer any information during that interview, as instructed and mandated by California law governing the attorney-client privilege, the government accused Petitioner of "lying" to the FBI. The trial court labelled Petitioner's failure to volunteer information as "misrepresent[ing] his knowledge", Appendix C, at C-5. Clearly, the evidence was that the FBI misrepresented facts to Petitioner, not vice-versa.

Petitioner responded to a government subpoena to produce all his documents pertaining to Torquato's companies. Because the response was a little less than one month late, the government accused Petitioner of being non-cooperative, despite the fact that Petitioner advised the government his delay was caused by his father's recent death from a long term battle with cancer. Additionally, Petitioner had the sole responsibility of the handling and finalization of his father's other estate and business matters. Is this the "good faith" work of our government? Especially when Petitioner was the only source of those documents? It was clear that while all the involved principals of Torquato's scheme were destroying their documentation relating to COM-MAX, Inc., Petitioner was cooperating with the government by making copies for them of all the information available to him. It was these copies that he, in good faith, turned over to the government. These actions of Petitioner cannot reasonably be labelled as "non-cooperative." Nor can these ac-

tions of Petitioner reasonably be labelled as withholding vital incriminating documents, Appendix C, at C-5.

Petitioner should have been tried separately from Smith. The government conceded that Petitioner's only involvement with Torquato's scheme was in complying with Torquato's requests to send COM-MAX stock to Scott O'Donnell on January 18, 1984; David Herbert on January 27, 1984; a $6,374.86 check to Robert Rade Stone, Esq., on June 18, 1984, as well as COM-MAX stock options to Mr. Stone and Ronald Schmeisser on June 25, 1984. His involvement was minimal. A separate trial would have lasted approximately two weeks. Importantly, such a separate trial would have been a fair trial. Truth would not have been buried as it was in his protracted and convoluted co-trial. In fact, when Robert Rade Stone, Esq. was subsequently separately tried for his having received the $6,374.86 check and COM-MAX Inc. stock options, his trial lasted only approximately two weeks and resulted in his acquittal!

It is clear that in Petitioner's co-trial, the evidence was not easy to follow. The court of appeals was not able to properly state the evidence that was presented. Examples of the court of appeals' statements indicating its inability to properly separate the evidence presented in Petitioner's co-trial are as follows:

(1) "The defendants called eighty-eight witnesses including many public officials who had dealt with Torquato on the FICA recovery contracts", Appendix A, at A-3. In Truth, Petitioner only called 19, including himself;

(2) "Stoneman executed the [Allegheny County] contract on behalf of CTA, Ltd.", Appendix A, at A-4. In Truth, Petitioner DID NOT execute that contract as Torquato admitted that Petitioner did not draft it nor did

he sign it. Torquato testified that he, Torquato, forged petitioner's signature.

(3) "Stoneman . . . did not file the corporate documents that would have identified the officers of the corporation and disclose its connection to CTA, Ltd." Appendix A, at A-5. In Truth, Petitioner did not file the Statement by Domestic Stock Corporation because under California law he had no authority to do so without express direction from Torquato. Only Torquato could have identified who the officers and directors were to be. Any inference that Petitioner had an ulterior motive in not filing that document is groundless and not supported by any evidence. Contrarily, Petitioner DID FILE the documents that he was authorized by law to file: The Articles of Incorporation that did disclose the connection between COM-MAX, Inc. and CTA, Ltd. Petitioner was listed in those Articles as the incorporator and initial agent for service of process. This not only gave the State of California jurisdiction over COM-MAX, Inc. but identified Petitioner as being associated with it. This was not the act of one with an ulterior motive of maintaining secrecy as to his connection between the two corporations, as Petitioner was also listed as an officer of XET, Ltd. dba CTA, Ltd. these facts created and disclosed COM-MAX's connection with CTA, Ltd.! A documented connection the court of appeals states was non-existent!

Also, the government proved that on February 18, 1984, Petitioner wrote a letter to Torquato's accountant, Mrs. Flanagan, reminding her and Torquato that the Statement by Domestic Stock Corporation had to be filed by June 5, 1984 by Torquato. Yet, this evidence was totally discarded and ignored in the court' statement that Petitioner wilfully did not file the document for ulterior reasons when, in Truth, Petitioner was simply not legally authorized to do so!;

(4) "Some of the profits from the FICA contracts were to be used to make the Com-Max stock valuable and, therefore, to benefit the public officials who were given Com-Max stock and stock options." Appendix A, at A-5. In Truth, no profits were ever intended by Torquato to be used. The evidence presented was that the profits from the Allegheny County and City of Pittsburgh contracts had not been so used and the profits of the school district contract were to be evenly divided between Smith and Torquato with Ellis receiving a percentage.

(5) "The contract was ultimately performed by an accounting firm, Levin-Horwith, for $1,300,000", Appendix A, at A-6. In Truth, the evidence was that the contract was not performed by Levin-Horwith, or anyone! Apparently the employees of the school district and the state of Pennsylvania are the big losers as a result of this prosecution, while the United States Government is forty million dollars richer.

It has been observed that when evidence is relatively uneasy to follow and lacks straight-forwardness, the more difficult it becomes for evidence to be compartmentalized by the jury. *Williamson v. United States* 310 F.2d 192, 198 (9th Cir. 1962). As previously mentioned, the case against Smith and Petitioner lasted three months in which 106 witnesses testified. These logistical facts alone raise a serious doubt as to the straight-forwardness and relative ease of which the evidence was presented and absorbed by the jury. These logistical facts must be considered in light of the manner in which Torquato, the only witness against Petitioner, testified. His testimony was non-responsive, confusing, rambling and conclusionary in nature.

The fact that Petitioner was acquitted of the 15 substantive counts, while Smith was convicted of eight, may be unpersuasive to, ipso facto, establish that the jury

easily understood and easily marshalled the evidence pertaining to Petitioner, however, considering the fact that the jury was so confused on the charges given them pertaining to the laws of conspiracy that they sought clarification on three separate occasions and considering that when each request followed the trial court's prior "clarification", then it is persuasive that, if the jury had marshalled and understood the evidence they would not have found Petitioner guilty of conspiracy based on the counts on which they had acquitted him! (Especially count Eight).

The incongruity of Petitioner's conviction of the conspiracy count, with his acquittal of all substantive counts comprising the acts of the conspiracy only adds strength to the strong inference that the jury could not place the evidence in its proper "compartments". A "compromised" verdict is not the product a "meticulous sifting of evidence". These facts make one take pause and reasonably question whether Petitioner was, indeed, convicted under a guilt by association theory. *Unites States v. Spock,* 416 F.2d 165 (1st Cir. 1969).

CONCLUSION

In a case of this magnitude of paperwork alone, it is quite easy to simply take the convenient way out and continue to misconstrue and misapply erroneous statements of "evidence presented". Or, to find that such misconstrued and misapplied evidence constitutes "substantial" evidence upon which a verdict of guilt can be premised. A reading of the court of appeals decision confirms this ease. However, Justice does not prevail when only the convenience for the judicial system is considered. For such lacks Wisdom and therefore deprives our judicial system of its very essence: the Search for Truth and Justice.

For the very reasons that Petitioner strenuously and continuously urged that he be separately tried from Smith is the very reason that the entire evidence in this case must be independently reviewed and analyzed. Otherwise, Truth will remain buried. Petitioner will serve his four months jail time and the system will continue with the false belief that it is still the "best system" going. But compared to what? The very essence of This Court is to see that Justice is, indeed, Served and properly dispensed. This Court must ask itself, why Petitioner has taken on the obvious and tremendous expense of money, time and effort to continue his Search for Justice when he simply could have opted out to his otherwise "slight" alternative term of four months incarceration? The True answer to this question can be found again in the Principles that are supposed to be the Foundation of our judicial system: Truth & Justice.

Deny not an old and faithful lawyer his last chance to argue a noble cause before this august Court.

Respectfully submitted,

JOHN BROWN, Esquire
CHRISTIAN MENARD, Esquire

By: JOHN BROWN

BROWN & MARTINEZ
500 Esplande Drive
Suite 1200
Oxnard, California 93030

Attorneys for Petitioner,
Alan R. Stoneman

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5532, 85-5702, 85-5714

UNITED STATES OF AMERICA

v.

SMITH, WILLIAM T., JR.

William T. Smith, Appellant
in 85-5532 and 85-5714

UNITED STATES OF AMERICA

v.

STONEMAN, ALAN R.

Alan R. Stoneman, Appellant in 85-5702

On Appeal from the United States District Court
for the Middle District of Pennsylvania - Scranton
D.C. Criminal Nos. 84-00156-04, 84-00156-05

Argued March 18, 1986

Before: Hunter, Mansmann,
Circuit Judges, and
Pollack,* *District Judge*

Opinion filed APRIL 28, 1986

---

*Honorable Louis H. Pollack, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

James J. West (Argued)
U.S. Attorney
David C. Shipman
Assistant U.S. Attorney
P.O. Box 11754
Harrisburg, PA 17108
Attorneys for United States of America

John Rogers Carroll (Argued)
Carroll & Carroll
615 Chestnut Street, Suite 1206
Philadelphia, PA 19102
Attorneys for William T. Smith, Jr.

John Brown (Argued)
Christian Menard
Brown & Martinez
500 Esplanade Drive, Suite 1200
Oxnard, CA 93030
Attorneys for Alan R. Stoneman

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

I. *INTRODUCTION*

1. XET. Ltd. d/b/a CTA, Ltd., Computer Technology Associates, Inc., John R. Torquato, Jr., William T. Smith, Alan R. Stoneman, Judy Ellis, and David Herbert were charged in a thirty-nine count indictment with conspiracy, 18 U.S.C. § 371 (1982), fifteen violations of the Interstate Transportation and Aid of Racketeering ("I.T.A.R." or "Travel Act") statute, 18 U.S.C. § 1952(a)(3) (1982) and the mail fraud statute, 18 U.S.C. § 1341 (1982). The indictment outlined a conspiracy involving fifty-one overt acts, seven mail fraud violations, and nine I.T.A.R. violations.

2. The conspiracy count alleged that the defendants sought to obtain Federal Insurance Contribution Act ("FICA") recovery contracts[1] from state and local entities, not by placing bids, but by bribing public officials with cash, stock, stock options, campaign contributions, employment, and paid travel. The defendants directed their efforts at obtaining the contracts for Allegheny County, the City of Pittsburgh, and the Pennsylvania school employees. The indictment alleged that the conspiracy existed from January 1983 until October 22, 1984.

3. Torquato, Ellis, and Herbert entered guilty pleas to various counts. Smith and Stoneman pleaded not guilty to all counts. Their trial began on March 26, 1985 and was completed on June 24, 1985. At trial, the government called twenty-two witnesses against Smith and Stoneman, including their principal witness, Torquato, to support the government's allegations that Smith had offered a total of $400,000 in bribes to the Treasurer and Attorney General of Pennsylvania and that Stoneman had participated in the bribery scheme. The defendants called eighty-eight witnesses including many public officials who had dealt with Torquato on the FICA recovery contracts.

4. The jury found Smith guilty of conspiracy, four counts of mail fraud and four I.T.A.R. counts. Stoneman was found guilty only of conspiracy. The court sentenced

---

[1]The amount of FICA tax paid by the employees of state and local governments in Pennsylvania is matched by the employing state or political subdivision. However, the tax need not be paid for employees subject to certain benefits for illness. If the government mistakenly pays the FICA taxes, it can claim a credit against future taxes and a refund for the employee. The procedure of obtaining the credits and refunds is known as FICA recovery. The defendant corporations sought contracts to prepare and submit FICA recoveries on behalf of state and local governments. The fees charged are determined by public bidding.

Smith, who could have received up to two million dollars from the scheme, to a twelve-year prison term and a $63,000 fine. Stoneman was sentenced to a prison term of four months and fined $10,000. The government presented no evidence that Stoneman was to receive any payment other than his usual attorney fees.

II. *EVIDENCE PRESENTED*

5. In early 1983, Smith and Torquato met to discuss how to obtain Pennsylvania state contracts to recover overpaid Social Security taxes. The two had been friends and business associates for over twenty years. Torquato is the son of a former Democratic County Chairman of Cambria County. Smith was then the Republican Chairman of Dauphin County. They agreed to make political contributions to officials in a position to award the contracts. Torquato introduced Smith to David I. Herbert, the State Director for Social Security, who controlled FICA recovery for Pennsylvania's public employees. The three men discussed other political subdivisions where they might obtain contracts. From January 1983 to October 1984, Smith and Torquato concentrated on obtaining contracts for Allegheny County, the City of Pittsburgh, and Pennsylvania state employees.

6. CTA, Ltd. obtained and performed a contract for FICA recovery for Allegheny County. This company had been formed by Stoneman on November 29, 1982. Torquato sent a copy of the proposal to Smith for review and wrote to him about contracts in other areas. Torquato paid $852.00 for James Scanlon, head of Allegheny County Computer Services, to take a trip to New York with his family. Stoneman paid this bill on August 31, 1983. Scanlon recommended that CTA, Ltd. be given the contract over other companies giving lower bids. Stoneman executed the contract on behalf of CTA, Ltd.

7. Torquato offered Gene Scanlon, James Scanlon's brother, a number of benefits including a $50,000 a year job at CTA, Ltd. for Jim Scanlon, mailing lists for his daughter's business, use of a rented car, payment for an airline ticket, and finally $100,000 to set up a "widget factory" in Hong Kong. Allegheny County paid CTA, Ltd. for the contract in November 1983. The next month, Torquato sent Smith $1,000 for his services along with a letter discussing how to influence Herbert.

8. Stoneman set up a California corporation, Com-Max, Inc., on January 5, 1984, but did not file the corporate documents that would have identified the officers of the corporation and disclosed its connection to CTA, Ltd. He sent 1,500 shares of Com-Max, Inc. to Herbert on January 22, 1984 with a letter stating that the stiel would be bought back in three years for at least $15,000. A similar letter plus 1,500 shares was sent to Scott O'Donnell, Chief Clerk of Allegheny County.

9. CTA, Ltd. also obtained a FICA recovery contract for the employees of Pittsburgh. The company was to be paid $150,000 even though another contractor, who eventually did the job for the city, had bid $35,000. In fact, after CTA, Ltd. obtained the contract, Torquato hired this bidder as a subcontractor to do the work for $35,000. Stoneman sent Robert Rade Stone, President of the Pittsburgh City Council, a $6,374.86 check drawn on Stoneman's own bank account and stock options for 35,000 shares of Com-Max stock. Stoneman also sent stock options for 25,000 shares to Richard Schmeiser, Director of Finance for the City of Pittsburgh. Some of the profits from the FICA contracts were to be used to make the Com-Max stock valuable and, therefore, to benefit the public officials who were given Com-Max stock and stock and options.

10. During 1983, the defendants tried to obtain the FICA recovery contract for all Pennsylvania state employees. Torquato and Smith wanted a fee of $8,000,000 for the job. In November 1983, however, they discovered that the contract was to be performed in-house at a cost of $300,000. To secure the contract, Smith and Torquato had visited the Republican State Chairman, Robert Asher, in July 1983 and offered him $500,000 from the contract for the Republican Party. They decided that, in order to obtain the FICA recovery contracts, they needed to have jurisdiction over the contracts moved from the governor to the State Treasurer, R. Budd Dwyer, a friend of Smith's. Smith met with Senate Minority Whip Eugene Scanlon, David Herbert, and Jim Scanlon to discuss legislation to accomplish the change. After the legislation passed, Torquato purchased $500 worth of tickets to House Majority Leader Jim Manderino's fund raiser.

11. Torquato and Smith met with the Treasurer of Pennsylvania on March 2, 1984, and discussed a $300,000 payment to be divided among the Treasurer, the Treasurer's reelection campaign, and the Republican State Committee. Herbert continued to aid Torquato and Smith and on May 10, 1984 the Treasurer awarded the Pennsylvania contract to the Pennsylvania company formed by Smith in April 1984, Computer Technology Associates, Inc. Herbert was to be given $100,000 in a Swiss bank account. The contract, awarded on a no-bid basis, would have generated $4,000,000 in profit, to be split between Smith and Torquato, at an expense to the Commonwealth of $6,000,000. The contract was ultimately performed by an accounting firm, Levin-Horwath, for $1,300,000 with a possibility of up to thirty-five percent being rebated.

12. To avoid any competition in collecting FICA overpayments, Smith attempted to obtain a ruling from the Attorney General of Pennsylvania, Leroy Zimmerman,

that the contract was exclusive. Smith told Patrick Boyle, Press Secretary to the Attorney General, that Torquato would give $100,000 to the Attorney General's reelection campaign. The Attorney General ruled that the Treasurer's Counsel could decide the issue. The Treasurer's Counsel then ruled that the contract was exclusive.

13. When Smith and Torquato heard that their contract might be investigated, they were concerned that officials might discover that Com-Max was a holding company for CTA, Inc., the company handling the school employees contract. In June 1984, Smith formed a new corporation Application Software Systems, Inc. (A.S.S.I.). The FBI searched Torquato's residence on July 6, 1984 and found records of payments to be made to various Pennsylvania officials. The defendants were indicted on October 22, 1984.

III. *VARIANCE BETWEEN THE INDICTMENT AND THE PROOF*

14. Smith and Stoneman claim that the conspiracy charged in the indictment impermissibly varied from the evidence at trial because the evidence proved multiple conspiracies. There are two possible ways in which the evidence at trial may vary from the indictment. First, an amendment may alter the terms of the indictment and, therefore, constitute a per se violation of the fifth amendment grand jury clause. *See Stirone v. United States,* 361 U.S. 212, 217 (1960); *United States v. Castro,* 776 F.2d 1118, 1121 (3d Cir. 1985); *United States v. Somers,* 496 F.2d 723, 743 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974). Second, a variance may exist if the evidence at trial proves facts different from those alleged in the indictment. The evil of a variance is that defendants may be deprived of notice of the charges against them and may be subject to double jeopardy. *See Gaither v. United States,*

413 F.2d 1061, 1071 (D.C. Cir. 1969). Variances are not subject to the *Stirone* per se rule. They are examined on a case-by-case basis and constitute reversible error only if the defendant was prejudiced. *See Castro,* 776 F.2d at 1121; *Somers,* 496 F.2d at 743. The Supreme Court recently considered the variance issue in *United States v. Miller,* 105 S.Ct. 1811 (1985). The *Miller* Court acknowledged that, under *Stirone,* trial evidence could not amend the indictment by broadening the bases for conviction. However, the court recognized that an indictment may permissibly allege more crimes than are actually proven at trial. *Id.* at 1815.

15. In the case before us, the court below properly instructed the jury that it could find that there was one master conspiracy and more than one subsidiary scheme. *See United States v. Kenny,* 462 F.2d 1205, 1261 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972). When a single conspiracy is charged in the indictment, there is a variance if the evidence at trial proves only the existence of multiple conspiracies. *See Kotteakos v. United States,* 328 U.S. 750 (1946); *United States v. Boyd,* 595 F.2d 120, 123 (3d Cir. 1978). However, a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance. The question of whether a single conspiracy or multiple conspiracies existed is a fact question to be decided by the jury. This court must sustain the jury's verdict if there is substantial evidence, viewed in the light most favorable to the government, to support the finding of a single master conspiracy with subsidiary schemes. *See United States v. Brooks,* 697 F.2d 517, 523 (3d Cir. 1982). *cert. denied,* 460 U.S. 1071 (1983). The evidence supported a finding of a single conspiracy which was formed with the goal of obtaining FICA recovery contracts through bribery and fraud. The fact that the

group sought more than one contract does not necessarily mean that there was more than one conspiracy.

16. The defendants contend that while the indictment charged one conspiracy, the evidence showed that three separate conspiracies existed: one to obtain the Allegheny County contract, one to obtain the Pittsburgh contract, and one to obtain the Pennsylvania employees contract. Smith claims that he was not part of the Allegheny contract or the Pittsburgh contract. He relies on *Unites States v. Camiel,* 689 F.2d 31 (3d Cir. 1982), for his argument that a variance exists. In *Camiel* we found a prejudicial variance when an indictment charged a single scheme for creating no-work jobs on the government payroll, while the evidence at trial supported an inference of two or more conspiracies. The evidence could not support a reasonable inference of a single scheme because the alleged coparticipants were members of two antagonistic factions which would not work together. *Camiel* is clearly distinguishable from the case before us as there is no evidence of antagonistic groups. We find that the evidence presented does support the jury's finding of a single conspiracy.

17. Smith claims that his only possible involvement in the Allegheny or Pittsburgh schemes was in forming Application Software Systems, Inc. ("A.S.S.I."). He contends that since concealment of the crime after the object of the conspiracy has been attained is not part of the conspiracy, *see Grunewald v. United States,* 353 U.S. 391 (1957); *United States v. Pflaumer,* 774 F.2d 1224, 1232 (3d Cir. 1985), he cannot be placed in the Allegheny and Pittsburgh schemes. This argument fails since the evidence supports a finding of a single conspiracy and a finding that Smith was involved in all three schemes well before the formation of A.S.S.I. During and after the

formation of A.S.S.I. the defendants continued to attempt to obtain FICA recovery contracts.

IV. *SUPPLEMENTAL JURY INSTRUCTIONS ON MASTER CONSPIRACY*

18. On June 13, 1985 the trial court instructed the jury on the conspiracy as follows:

> The indictment alleges the existence of a conspiracy to commit mail fraud, and additionally, charges mail fraud itself. An essential element of both charges is that the Government must prove beyond a reasonable doubt the existence of a single scheme to defraud as charged in the indictment.
>
> A Defendant may not be convicted unless he was a willing, knowing and active participant in the particular scheme to defraud alleged in this indictment.
>
> Unless the jury finds beyond a reasonable doubt that the Government has proved the existence of a single scheme to defraud, as charged in the indictment, the Defendant must be acquitted of the pertinent counts. The single scheme charged includes the obtaining of FICA recovery contracts from Allegheny County, the City of Pittsburgh and also the Commonwealth of Pennyslvania.
>
> If you find that Mr. Torquato and others were involved in separate conspiracies concerning or regarding Allegheny County or City of Pittsburgh, or Pennsylvania School District FICA recovery contracts, and that the Defendant was not a participant in one or more of these separate conspiracies, then your verdict as to the Defendant on the entire indictment must be not guilty.
>
> By separate conspiracy, I mean a conspiracy that has no connection with another conspiracy except for the

fact that John Torquato, Jr., or one or more other individuals, played a role in both conspiracies.

You may, however, find that the Defendant participated in the conspiracy charged in the indictment even if that conspiracy encompassed three related subconspiracies involving different groups of individuals.

Both Smith and Stoneman object to the following supplemental instructions given to the jury the next day on the issue of a master conspiracy with subsidiary schemes:

A single conspiracy is one in which the Defendants and those with whom they are charged with conspiring share a common goal of the conspiracy set forth in the indictment. Separate conspiracies, although they may have common elements, common participants, common means, some common objectives, or other common factors, but which lack the critical element of common objectives of the conspiracy on the part of all of the participants, do not qualify as a single conspiracy.

. . .

The gist of a criminal conspiracy may involve numerous transactions and the fact that conspirators individually or in groups perform different tasks in pursuing a common goal does not necessitate a finding of several conspiracies.

Even if a small group is at the heart of an unlawful agreement, others who knowingly participate with core members to achieve a common goal may be members of a single conspiracy.

Accordingly, you may find that a master conspiracy for the obtaining of FICA recovery contracts by a bribery and fraud existed and that more than one

subsidiary scheme was involved. You should review the indictment and determine if the master conspiracy charged therein has been proven.

19. The defendants claim that these instructions lacked the "concrete accuracy" required of supplemental instructions. *See Bollenbach v. United States,* 326 U.S. 607, 613 (1946). They contend that the jury's question concerning whether the defendants had to be involved in all three FICA recovery contracts if they were to be found guilty of conspiracy shows that instructions confused the jury. They further claim that the instructions on master conspiracy and subsidiary scheme presented a new theory of liability wholly different from the theory argued at trial. This alleged change in theory, they maintain, violated Federal Rule of Criminal Procedure 30[2] because defense counsel was not given notice of the instruction before closing argument. Material modifications of instructions will give rise to a violation of Rule 30 because the defendant is not given an opportunity to address the charge. Finally, the defendants argue that the instruction described an offense different than the one charged in the

---

[2]Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

indictment and therefore created an impermissible variance under ***Kotteakos and Stirone.***

20. We are unpersuaded by these arguments and find that the defendants were not prejudiced by the giving of the supplemental charge. We first note that the instruction given was a correct statement of the law. *See United States v. Kenny,* 462 F.2d 1205 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972). Moreover, the supplemental instruction on a master conspiracy and subsidiary scheme did not present a new theory of criminal liability and was not a material modification of the original instructions. The supplemental instruction was merely an elaboration of the earlier instruction. The instruction explained that a single conspiracy rather than multiple, unrelated conspiracies had to be found. However, the instruction also stated the single conspiracy could consist of a master conspiracy with one common objective but with several subsidiary schemes.

21. The defendants had notice of the multiple conspiracy issue. The issue was raised in the briefs for pretrial motions. At that time the government cited to *Kenny.* The defendants themselves had proposed supplemental instructions which addressed the need to find a single conspiracy. At the charge conference, the parties referred to the question of whether each FICA recovery contract was a subpart of the conspiracy. Indeed, it was defense counsel who requested a supplementary instruction on what constituted a separate conspiracy. The charge made it clear to the jury that a single conspiracy must have a common objective. The instruction on subsidiary schemes

did not state a new theory and defense counsel had notice of the issue. There was, therefore, no violation of Rule 30.[3]

V. *JURY INSTRUCTIONS ON THE TRAVEL ACT VIOLATIONS*

22. Counts 11 to 16 of the indictment charged Smith with violations of the Travel Act, 18 U.S.C. § 1952.[4] Smith was acquitted on Counts 11 and 16, which referred to Torquato's travel on January 24 and June 7, 1984. He was convicted, however, on Counts 12 through 15 which referred to Torquato's travel on February 27, March 19, April 17, and April 29, 1984.

23. The district court instructed the jury on the Travel Act violations as follows:

---

[3]Supplementary instruction #32 stated:

> Even if you find that multiple conspiracies existed, you still must individually consider the substantive violations contained in counts 2 through 16, and determine if a particular defendant is criminally responsible for these distinct uses of the United States mail and the facilities of interstate commerce.

We need not address the defendant's argument that instruction #32 was improper since the jury found the defendants guilty of conspiracy and therefore did not need to follow instruction #32.

[4]18 U.S.C. § 1952 states:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent —
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years.
>
> . . .

> The term 'interstate commerce' means transportation or movement including the use of interstate telephone facilities and the movement of mail between one state and another state and while it must be proved that an individual used the facility of interstate commerce with the specific intent to promote, manage, establish or carry on an unlawful activity, it need not be proven that such purpose was the only reason promoting the facility of commerce to be used.

Smith claims that the jury should have been specifically instructed that there had to be an act of bribery subsequent to each trip by Torquato. Smith argues that the district court did not properly charge on the requirement that there be a sufficient nexus between the interstate travel and the unlawful activity. Smith claims that the district court erred in refusing to give a supplemental instruction stating:

> There must be a connection between the travel and the subsequent act of bribery. It would not be enough, for example, for the government to prove that travel occurred on a particular occasion and at some subsequent time an act of bribery occurred unrelated to the travel. The travel may not be merely incidental to the unlawful activity. There must be a coincidence between the travel and the act of bribery in the sense that the purpose of the travel (or use of interstate facility) was to perform the act of bribery and, thereafter, an act of bribery was performed that was contemplated when the travel took place.

24. There is no requirement that the interstate travel forming the basis of a Travel Act violation be essential to the unlawful scheme. It need only make easier or facilitate the unlawful activity. *See United States v. Perrin*, 580 F.2d 730, 736 (5th Cir.), *aff'd*, 444 U.S. 37 (1978) (Travel

Act violation based on act of telephoning map service out of state). However, the nexus between the travel and the unlawful scheme may be so "isolated, minimal, inconsequential, and nonessential" to the scheme that it is "insufficient to establish jurisdiction under the Travel Act," *Id.* at 735. *See also Rewis v. United States*, 401 U.S. 808 (1971) (although the defendant ran a gambling establishment, his out-of-state customers were an insufficient basis for charging a Travel Act violation); *United States v. Isaacs*, 439 F.2d 1124, 1146 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (no Travel Act violation based on accepting a check that cleared through an out-of-state Federal Reserve Bank); *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971) (no Travel Act violation based on advertising for an illegal lottery ticket salesman in a newspaper with 2-3% out-of-state subscribers).

25. In *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979), this court found that there was a sufficient interstate nexus to establish a Travel Act violation based on acts similar to those in question in the case before us. In *Wander* a group of conspirators were acting in Pittsburgh. One member, Currie, went to Florida for reasons unrelated to the conspiracy. Nevertheless, telephone calls to Currie and travel by Currie in returning to Pittsburgh formed the basis for a Travel Act charge. We found that while the "extortion scheme could have been carried out without any interstate involvement had Currie remained in Pittsburgh . . . . once Currie moved to Florida it became essential to the implementation of the defendants' scheme that they use interstate facilities to secure her presence in Pittsburgh," *Id.* at 1255. Similarly, interstate travel was not an absolute necessity to the bribery scheme we are now considering, but because one of the participants, Stoneman, was in California, interstate travel did facilitate the planning and implementation of the scheme.

26. The district court has wide discretion in charging the jury. We will find that the court erred in refusing to give an instruction only if the instruction was correct, not substantially covered by other instructions, and was so important that the omission of the instruction prejudiced the defendant. *See United States v. Sans*, 731 F.2d 1521, 1539 (11th Cir.), *cert. denied*, 105 S.Ct. 791 (1984). The district court in this case adequately charged the jury on the need for a nexus between the travel and the bribery when it stated "transportation . . . between one state and another state" requires proof that the "individual used the facility of interstate commerce with the specific intent to promote, manage, establish or carry on an unlawful activity. . . . " The evidence shows that Torquato, alone or with Smith did meet with government officials as part of the bribery scheme after each of the trips.

VI. *ELEVEN PERSON JURY*

27. On the fourth day of jury deliberation, after a three-month trial, one of the jurors was severely injured in an automobile accident. The defendants refused to stipulate to an eleven-person jury. The district court judge permitted the jury to continue deliberation with only eleven jurors pursuant to Federal Rule of Criminal Procedure 23(b), which states:

> (b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its ver-

> dict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

Rule 23(b) was amended in 1983 to give judges the discretion to allow eleven person juries to continue deliberation if one juror became unavailable. Before 1983, eleven person juries were permitted only by stipulation. Stoneman and Smith challenge the constitutionality of Rule 23(b).

28. Only two courts have considered the constitutionality of the discretionary part of Rule 23(b). A district court applied Rule 23(b) when one juror saw some notes of the United States Attorney after deliberations had begun. *See United States v. Bambino*, 598 F. Supp. 646 (D.N.J. 1984). The Second Circuit recently considered the constitutionality of Rule 23(b) at length in *United States v. Lowell*, Nos. 84-1441, 1459, 1460, 1463, 1365 (2d Cir. December 13, 1985), *cert. denied*, 54 U.S.L.W. 3562 (U.S. February 24, 1986). We agree with both of these courts that Rule 23(b) is constitutional.

29. The Supreme Court has held that a six-member jury is constitutionally permitted. *See Williams v. Florida*, 399 U.S. 78 (1970). It is clear to us that twelve jurors are not required for a conviction. Contrary to the defendant's contentions, Rule 23(b) does not allow a less than unanimous verdict. Rule 23(b) was amended to deal with those situations in which a juror became unavailable after a lengthy trial and a mistrial would be extremely burdensome. Rule 23(b) provides a better solution than the technique used in the past of substituting an alternate juror even after delberations had begun. *See United States v. Hillard*, 701 F.2d 1052 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983). We find no constitutional defect in the rule.

VII. *DISCLOSURE OF ALCOHOL TREATMENT RECORDS OF GOVERNMENT WITNESSES*

30. Smith and Stoneman claim that the denial of their motion to order disclosure of the alcoholism treatment records of government witnesses John R. Torquato, Jr. and Judy Ellis deprived the defendants of their sixth amendment rights. Torquato and Ellis admitted that they had been alcoholics and had attended a rehabilitation center, the Care Unit Hospital of Orange, California ("Care Unit"), before the trial. The defendants cross-examined Torquato and Ellis on their alcoholism and had the opportunity to question the other witnesses, who had dealt with Torquato and Ellis, on any effects of the alcoholism. However, the defendants sought to obtain the treatment records of Torquato and Ellis from the Care Center. They were most concerned with the records of Torquato, the government's principal witness. They claimed that without the records they would be deprived of their sixth amendment rights to confrontation and compulsory process of witnesses.

31. The records of patients in drug rehabilitation programs that are assisted by the federal government must be kept confidential. *See* 42 U.S.C.A. § 290dd-3(a) (West.Supp. 1985). A court may order disclosure pursuant to § 290dd-3(b)(2)(c) and the regulations at 42 C.F.R. § 2.61 (1985) if "good cause" has been shown. "In assessing good cause the court shall weigh the public interest and need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." *Id.* The application should be denied when "other competent evidence of sources of information are available. . . ." 42 C.F.R. § 2.64(e) (1985). Records can be disclosed only if they contain objective data unless they fall within the exception in 42 C.F.R. § 2.63 (1985) which provides that, "[w]hen a patient in litigation offers

testimony or other evidence pertaining to the content of his communications with the program," the records may be disclosed. Because Torquato did not testify on his communications while in the program, this exception does not apply. Therefore, the defendants can seek the disclosure of only those portions of the records, if any, that contain objective data.

32. Although Torquato stated that he would waive the physician-patient privilege, there is a public interest in maintaining the confidentiality of patient records at the Care Unit. The defendants have not made a sufficient showing of need for the records. They wished to use the records to impeach Torquato's credibility. Torquato had admitted that he had been an alcoholic. Moreover he was subject to cross-examination for seven days and the defendants had the opportunity to examine other witnesses on Torquato's alcoholism. Therefore, we do not find that the defendants have shown good cause for disclosing the records or that their right to cross-examine Torquato was impaired. The public interest in confidentiality outweighs the defendant's needs when the records would provide little new material that could be used to impeach the witness's credibility. *See United States v. Graham,* 548 F.2d 1302, 1314 (8th Cir. 1977); *B v. State,* 385 So.2d 78 (Ala. App. 1980). A defendant is not entitled to obtain evidence that would only marginally impugn a witness's credibility but that would severely prejudice a public interest requiring confidentiality. *Cf. United States v. Adams,* 759 F.2d 1099 (3d Cir.), *cert. denied,* 106 S.Ct. 275 and 106 S.Ct. 336 (1985) (court limited cross-examination of witness in the Witness Protection Program).

VIII. *SEVERANCE OF STONEMAN'S TRIAL*

33. Stoneman claims that he was prejudiced when the trial court denied his motion to have his trial severed

pursuant to Federal Rule of Criminal Procedure 14. He conjectures that the consolidated trial confused the jury because the government used the term "CTA" to refer to both CTA, Ltd. and Computer Technology Associates, Inc. Stoneman did not object to the use of the name CTA during trial. Furthermore, we do not believe that the use of the term resulted in undue prejudice to Stoneman.

34. Stoneman also maintains that he was prejudiced by being tried with Smith because the extensive damaging evidence against Smith and testimony on Torquato's actions "rubbed off" onto Stoneman to render him guilty by association. *See United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), citing *United States v. Kelly*, 349 F.2d 720, 756-59 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). We review the trial court decision not to sever the trial only for an abuse of discretion. *See United States v. Boyd*, 595 F.2d 120, 125 (3d Cir. 1978); *United States v. Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). As long as the government has charged conspiracy in good faith, an allegation of conspiracy is a sufficient reason for trying the conspiracy and all substantive offenses together. *See Somers*, 496 F.2d at 729-30. In determining whether a particular defendant was prejudiced by a joinder of defendants, we look to whether the jury could compartmentalize the evidence against each defendant. A defendant is not entitled to a severance merely because the evidence against his codefendants is more damaging than the evidence against him. *See United States v. DiPasquale*, 740 F.2d 1282, 1293 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1226 (1985); *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). We conclude that the jury could understand what evidence concerned each defendant and, therefore, that Stoneman was not prejudiced by the denial of his motion to sever the trial.

IX. *SUFFICIENCY OF THE EVIDENCE TO CONVICT STONEMAN*

35. Stoneman contends that there is insufficient evidence to support his conviction. In addressing this contention we must determine if there was sufficient evidence on which reasonable persons could find Stoneman guilty beyond a reasonable doubt. In doing so, we must view the evidence in a light most favorable to the government. *See Glasser v. United States,* 315 U.S. 60, 80 (1942). The district court found that the verdict was supported by substantial evidence.

36. The evidence showed that Stoneman incorporated the California corporation, Com-Max, Inc. He sent stock in the corporation to Pennsylvania officials including David I. Herbert, the State Director of Social Security, Robert Rade Stone, the President of Pittsburgh City Council, Scott O'Donnell, the Administrator of Allegheny County, and Ronald Schmeizer, an employee of the City of Pittsburgh. He also sent a check for $6,374.86, drawn on his own bank account, to Stone. Torquato testified that Stoneman was aware of the reason for sending stock, stock options, and the check to the Pennsylvania officials. Torquato also testified that Stoneman suggested his own bank account be used for the check to make it difficult to trace the payment to Torquato. The government noted that the cover letters to the officials refer to Stoneman and not Torquato, that the deposit slip for $6,374.86 was entered as a split deposit, and that the schedule of officers for Com-Max, Inc. was never filed with the California Secretary of State. The government claims that these actions were taken to avoid creating a paper trail to the company. Stoneman maintains that this argument is weak, since Stoneman's actions avoided any paper connection between Torquato and Com-Max, Inc., but provided ample evidence of a link between Stoneman himself

and the corporation. There was evidence that Stoneman did not cooperate with the FBI investigation.

37. Stoneman contends that all of his actions were the normal activities of an attorney for a small corporation. He claims that he had no knowledge of who the Pennsylvania officials were or that any bribery scheme existed. A person is not guilty of conspiracy unless he had knowledge of the illicit purpose of the conspiracy when he performed acts that furthered that purpose. *See United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975). There was no direct evidence that Stoneman had knowledge of some improper purpose. Stoneman also observes that the government offered no evidence of motive. *See United States v. Wise*, 108 F.2d 379 (7th Cir. 1939). There was no evidence that Stoneman received, or would ever have received, anything more than his normal attorney fees. However, the jury was entitled to make a finding of knowledge and therefore guilt based on circumstantial evidence and credibility. Clearly, the jury did not believe Stoneman's explanations of his actions. We find that the jury could properly infer guilt from the evidence presented. *See United States v. Ordones*, 469 F.2d 70, 71 (9th Cir. 1972) (jury need not believe defendant's story that the had no knowledge).

X. *CONCLUSION*

38. For the reasons discussed above we will affirm the judgment of the district court in all respects.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5702

UNITED STATES OF AMERICA

v.

STONEMAN, ALAN R.
Appellant

SUR PETITION FOR REHEARING

Present: Aldisert, *Chief Judge*, Seitz, Adams, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, Stapleton and Mansmann, *Circuit Judges*

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ (Illegible)

Judge

Dated: May 23, 1986

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

ALAN R. STONEMAN

Criminal No. 84-00156-05

(Judge Muir)

Filed: October 13, 1985 Donald R. Berry, Clerk

OPINION

MUIR, District Judge.

I.

INTRODUCTION AND PROCEDURAL HISTORY.

Currently pending before this Court are Alan R. Stoneman's motion for judgment of acquittal, motion in arrest of judgment, and motion for a new trial. On October 22, 1984, a sixteen-count indictment was returned against two corporate and five individual Defendants, including Alan R. Stoneman. Stoneman's trial began on March 26, 1985 and ended on June 24, 1985 when the jury returned a verdict of guilty on Count 1, conspiracy to violate statutes prohibiting mail fraud, 18 U.S.C. § 1341, and interstate transportation in aid of racketeering, 18 U.S.C. § 1952.

II.

MOTION FOR ARREST OF JUDGMENT.

A motion for arrest of judgment shall be granted ". . . if the indictment . . . does not charge an offense or if the court was without jurisdiction of the offense charged." Rule 34 Fed.R.Crim.P. Stoneman agrues that this Court should arrest judgment because the indictment charges multiple conspiracies as opposed to a single conspiracy. This is not an accurate description of the indictment. The indictment charges a single conspiracy corruptly to influence public officials to award FICA recovery contracts to a California corporation, XET, Ltd. t/d/b/a CTA, Ltd.

Stoneman also alleges that this Court was without jurisdiction over the distinct conspiracies involving the Allegheny County FICA Recovery Project and the City of Pittsburgh FICA Recovery Project and alleges that these conspriacies were not committed in this district. This argument relies upon the incorrect assumption that the FICA Recovery Projects in Allegheny County and the City of Pittsburgh were separate from the overall conspiracy involving FICA recovery contracts throughout Pennsylvania. The evidence was that Stoneman and others attempted as part of one overall scheme to influence Pennsylvania state and local public officials to award FICA recovery contracts to CTA. Since many of the events involved in the single conspiracy occurred in the Middle District of Pennsylvania, this Court has jurisdiction over this case. Stoneman's motion for arrest of judgment will be denied.

III.

SUFFICIENCY AND WEIGHT OF THE EVIDENCE.

Stoneman argues that he is entitled to a judgment of acquittal or a new trial because the verdict is contrary to

the weight of the evidence and is not supported by substantial evidence.

The Court must grant a motion for judgment of acquittal ". . . . if the evidence is insufficient to sustain a conviction" of the offense charged in the indictment. Rule 29(a) Fed.R.Crim.P. The standard of review is whether, viewing the evidence in the light most favorable to the Government, the jury's verdict is supported by substantial evidence. *Glasser vs. United States,* 315 U.S. 60, 80 (1942), *United States vs. Delerme*, 457 F.2d 156, 160 (3d Cir. 1972). The issue in a motion for acquittal is whether this Court has reason to believe that there was sufficient evidence on which reasonable persons could find Stoneman guilty beyond a reasonable doubt. *United States vs. Pratt*, 429 F.2d 690 (3d Cir. 1970), *United States vs. Leach*, 427 F.2d 1107 (1st Cir. 1970).

The Court may grant a new trial ". . . if required in the interest of justice." Rule 33 Fed.R.Crim.P. Unlike a motion for judgment of acquittal, the motion for new trial is based upon the weight of the evidence and the Court may weigh evidence and consider the credibility of witnesses. *United States vs. Pepe*, 209 F.Supp. 592, 595 (D. Del. 1962), *aff'd per curiam*, 339 F.2d 264 (3d Cir. 1964). The motion for new trial is addressed to the discretion of the Court and the power to grant a new trial on the ground that the verdict is against the weight of the evidence should only be invoked in exceptional cases. Wright, Federal Practice and Procedure: Criminal 2d § 553.

The evidence showed the following facts: Stoneman and others were part of an overall scheme to bribe Pennsylvania public officials so that FICA recovery contracts would be awarded to CTA, a California corporation. Stoneman incorporated a California corporation known as COM-MAX, Inc. and sent COM-MAX stock or

stock options to David Herbert, State Director of Social Security for Public Employees, Robert Rade Stone, President of Pittsburgh City Council, Scott O'Donnell, Chief Clerk to the Commissioners of Allegheny County, and Ronald Schmeizer, Director of Finance of the City of Pittsburgh. According to Torquato, Stoneman was fully knowledgeable about payments being made to public officials and Torquato had specifically discussed using the COM-MAX stock and stock options to bribe public officials. Stoneman sent a check in the amount of $6,300 to the President of the Pittsburgh City Council drawn on his bank account so that the payment could not easily be traced to Torquato or any of the companies he controlled. Stoneman's attempt to hide the bribes was corroborated by circumstantial evidence such as the fact that the cover letters delivering the stock and stock options contained no reference to Torquato but instructed the recipients to get in touch with Stoneman, the deposit slip for Stoneman's bank account showed the $6,000.00 bribe payment as part of a "split deposit," and the schedule of officers for COM-MAX, Inc. was never filed with the California Secretary of State but listed only Stoneman, thereby reducing the "paper trail" of the corporation.

Another Government witness, Janice Kincaid, was present when Stoneman and Torquato discussed how to make it difficult to trace bribe money through the issuance of a series of cashier's checks and Stoneman indicated he knew about a $1,000.00 "bonus" which Kincaid had received as reimbursement for her check to the Pennsylvania Republican State Committee.

The evidence showed that Stoneman was present when documents were destroyed immediately after the execution of the search warrant on Torquato's residence on July 6, 1984, that Stoneman subsequently delivered documents to co-defendant July Ellis for destruction, that he

misrepresented his knowledge concerning the issuance of COM-MAX stock when interviewed by agents of the Federal Bureau of Investigation in September, 1984, and that when the records of COM-MAX were subpoenaed before a federal grand jury in October, 1984, Stoneman withheld vital incriminating documents until November, 1984. He testified that long missing documents important to this case were found by him in his wine cellar. He altered his books of original entry showing the purpose for the $6300.00 check to the President of the Pittsburgh City Council.

The evidence showed beyond a reasonable doubt that Stoneman was guilty of involvement in the conspiracy to obtain FICA recovery contracts through bribery. Stoneman's motion for judgment of acquittal and Stoneman's motion for new trial will be denied.

IV.

STATEMENTS OF COCONSPIRATORS; STONEMAN's HEARSAY ARGUMENTS.

Stoneman lists 32 statements which he claims were highly inflammatory hearsay statements not within the coconspirator exception of Rule 801(d)(2)(E) of the Federal Rules of Evidence which provides that "A statement is not hearsay if — . . . The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." We have considered each of the statements which Stoneman alleges were improperly admitted into evidence despite the fact that Stoneman has not provided any argument in his brief to support his contention. Most of the statements listed by Stoneman fell within Rule 801(d)(2)(E) and were therefore not hearsay. We are not persuaded by Stoneman's claim that many of the statements listed by Stoneman were not

made "in furtherance" of the conspiracy. Finally, some of the 32 statements were not offered to prove the truth of the matter asserted by the statement and thus they were not hearsay as defined by Rule 801(c) Fed.R.Ev.

Stoneman argues that the Court erred in admitting the 32 statements which he claims were hearsay without a limiting or cautionary instruction as to Stoneman. We have already held that these statements were not hearsay; moreover, this Court fully instructed the jury regarding the inadmissibility of hearsay. Transcript, Volume 40, pp. 149-150, 152.

Stoneman contends that this Court erroneously failed to determine the applicability of the coconspirator rule to the statements alleged by Stoneman to be hearsay, i.e., this Court neglected to determine whether it was proved by a preponderance of the evidence that a joint undertaking existed at the time of the statement, as required by *United States vs. Trowery,* 542 F.2d 623 (3d Cir. 1976), *Government of Virgin Islands vs. Dowling,* 633 F.2d 660 (3d Cir. 1980), and other cases.

> . . . before an alleged coconspirator's hearsay declaration made in furtherance of a conspiracy may be submitted to the jury as evidence of a defendant's guilt on a conspiracy charge, the prosecution must have established the declarant's and the defendant's participation in a conspiracy by a preponderance of the independent evidence. (citations omitted).

Government of Virgin Islands vs. Dowling, 633 F.2d 660 (3d Cir. 1980). We have no recollection that Stoneman gave this reason at any or all of the times he advance the hearsay objection. Furthermore, this Court is not required to make *explicit* findings that the Government established the existence of the alleged conspiracy and the Defendant's connection with it since such a conclu-

sion may be inferred from the Court's denial of the Defendant's motion for acquittal and submission of the evidence to the jury. *United States vs. Continental Group, Inc.,* 603 F.2d 444, 457-458, 460 (3d Cir. 1979), *cert. denied,* 444 U.S. 1032, 100 S.Ct. 703 (1980), *Government of Virgin Islands vs. Dowling,* 633 F.2d 660 (3d Cir. 1980). Evidence sufficient to prove Stoneman's involvement in the conspiracy came early in the case during Torquato's testimony. The fact that this Court denied Stoneman's motion for judgment of acquittal made at the conclusion of the Government's case and at the conclusion of all of the evidence is sufficient to show that we made the necessary threshold determination that Stoneman was involved in the conspiracy by a clear preponderance of the evidence. Having made such a determination, the statements of coconspirators such as Smith were properly admitted pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence.

V.

JOINDER OF OFFENSES AND OF DEFENDANTS.

Stoneman reasserts and incorporates by reference his motion for relief from prejudicial joinder of offenses and defendants pursuant to Rule 14 of the Federal Rules of Criminal Procedure made before and during the course of the trial as grounds for his post-trial motions. We carefully considered our rulings when this motion was made previously and we adhere to our reasoning and rulings stated in prior orders of this Court. *See* Order No. 2 of February 1, 1985.

Stoneman argues that he was prejudiced by being tried jointly with Smith because there were three separate conspiracies proved rather than the one conspiracy charged in the indictment and Stoneman was not involved in all three conspiracies. The evidence presented during

Stoneman's trial does not support the argument that there was a variance between the indictment and the proof. The evidence showed beyond a reasonable doubt that there was a single conspiracy involving the awarding of FICA recovery contracts to CTA. Stoneman was involved in sending stock certificates to public officials involved in the Allegheny County, the City of Pittsburgh, and the Commonwealth of Pennsylvania FICA recovery contracts. The evidence showed that Stoneman was knowledgeable about the size of the conspiracy and its essential nature. On October 17, 1985, we issued an opinion and order in this case denying Defendant Smith's motion for judgment of acquittal and in the alternative, for a new trial. In that opinion, we addressed in detail the argument made by both Smith and Stoneman that there was a variance between the indictment and the proof relating to the issue of single and multiple conspiracies. We incorporate by reference section III of that opinion.

The evidence presented at trial and this Court's instructions enabled the jury to sift through the evidence and appraise the evidence against each Defendant solely upon the Defendant's own acts, statements, and conduct. The jury convicted Stoneman on the conspiracy count and acquitted him on all of the substantive counts which shows that it was able to differentiate between evidence relevant to Smith and evidence relevant to Stoneman. As we have already held, sufficient evidence was presented against Stoneman to support the jury's finding of guilt on the conspiracy count. Stoneman was not prejudiced by being tried jointly with Smith.

VI.

THE *INADI* ISSUE; TESTIMONY OF JOHN R. TORQUATO, JR. REGARDING CONVERSATIONS WITH EGIDIO CERULLI.

Stoneman argues that the admission of the testimony of John Torquato concerning Torquato's conversations with Egidio Cerulli was prejudicial and requires the granting of a new trial. This precise argument was made by Smith in his post-trial motions, and we addressed this issue in our opinion and order of October 17, 1985 in *U.S. vs. Smith.* Torquato's testimony concerning Cerulli's statements did not violate the Confrontation Clause of the Sixth Amendment, was a relatively shore and unimportant aspect of the Government's case, and indicated that Cerulli said nothing about Stoneman's involvement in the scheme to bribe public officials. Stoneman's name was not mentioned by Cerulli at all. Transcript, Volume IV, pp. 72-74. We incorporate Section VI of our opinion in *U.S. vs. Smith* of October 17, 1985 by reference.

VII.

THE CHARGE TO THE JURY.

A. *The Conspiracy Instructions*

Stoneman contends that he is entitled to a judgment of acquittal or a new trial because this Court's additional charge to the jury on June 14, 1985 violated Rule 30 of the Federal Rules of Criminal Procedure and was prejudicial to Stoneman. Stoneman contends that he was prejudiced by the additional instruction because his counsel did not have the opportunity to know before the closing arguments that an instruction would be given regarding single and multiple conspiracies. Further, Smith contends that the new instruction altered the Government's theory of

the conspiracy such that the indictment failed to inform Smith of the nature of the charges against him.

In section III of our opinion and order of October 17, 1985 in *U.S. v. Smith*, we addressed in full these arguments which were raised by Defendant Smith in his post-trial motion for judgment of acquittal and in the alternative, for a new trial. Stoneman presents no authority or arguments regarding this issue which were not presented by Defendant Smith. We incorporate herein by reference Section III of our opinion of October 17, 1985 in *U.S. vs. Smith* and hold that Stoneman was not prejudiced by our giving the new instruction. Stoneman's request for a judgment of acquittal or for a new trial on this basis will be denied.

B. *The Court's Instructions in Response to Jury Questions.*

Stoneman argues that supplemental instructions given to the jury on June 18, 1985 in response to a question of the jury was prejudicial to him. On June 17, 1985, the jury submitted a note to the Court asking for the

> . . . charges in the Court's definition of conspiracy and the original definition from the charge as given Friday a.m., also part of the charge relative to Count 1, and relativity of that finding to the balance of the counts from Thursday afernoon . . .

Transcript, Volume 42, pp. 14-15. After consultation with counsel, in response to the question of the jury, we gave a full and complete instruction which we will not repeat here because of its length. *See* Transcript, Vol. 43, pp. 8-23. For the most part, this response to the jury's question was a repetition of the original charge to the jury.

Stoneman asserts that "In addition to injecting confusion into the minds of the jury on what actually does constitute a conspiracy, the supplemental instructions . . . permitted the jury to find the defendants vicariously

liable for a substantive offense without proof of some nexus between Counts 1 and the substantive offenses." Stoneman's memorandum in support of his motion for a new trial filed July 24, 1985, p. 34. The supplemental instruction was an accurate statement of the law and was responsive to the jury's question. The instruction could not have confused the jury; rather, it helped to clarify the law for the jury. Further, Stoneman's argument that the supplemental instruction permitted the jury to find him "vicariously liable for a substantive offense" is frivolous since Stoneman was not convicted of a substantive offense.

Stoneman contends that this Court erred in responding to the jury's question "If a defendant is guilty of Count 1, must he knowingly participate in counts 2 through 16 to be found guilty of these counts?" Stoneman fails to address this argument in his brief. We believe that our instruction to the jury in response to this question was proper. Further, we view this argument as frivolous since Stoneman was not convicted of the substantive counts which were the subject of the jury's question and our responsive instruction.

C. *Rejected Points for Charge.*

Stoneman contends that he is entitled to a judgment of acquittal or a new trial on the grounds that this Court erred in denying Stoneman's points numbered 5, 10, 17, 18, 21, supplemental 3, supplemental 5, supplemental 6, as well as Defendant Smith's points numbered 3, 22, supplemental 2, and supplemental 8. Stoneman submits no argument in support of his contention regarding Defendant Smith's points; therefore, we will not specifically address Smith's points here.

We will address Stoneman's arguments regarding the denial of his points *seriatim.*

Stoneman's Point No. 5.

This Court was under no obligation to give Stoneman's point No. 5 in the exact language proposed. We gave a full, complete, and accurate instruction covering the subject matter of the point requested by Stoneman by instructing the jury that accomplice testimony comes from a polluted or corrupt source and should be carefully scrutinized. Transcript, Volume 40, pp. 130-132. The language given is stronger and more favorable to the defense than the language proposed in Stoneman's point no. 5.

Stoneman's Point No. 10.

This Court gave a full and complete instruction on circumstantial evidence. Transcript, Volume 40, pp. 122-123. Stoneman's argument that we erroneously refused to give point no. 10 is frivolous.

Stoneman's Point No. 17.

This Court declined to give Stoneman's point 17 which defined the word "willfully" and we covered this point by giving the following instruction:

> To act or participate willfully means to act or participate voluntarily and intelligently and with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law.

Transcript, Volume 40, p. 150. This charge is broader and more favorable to Stoneman than that to which he was entitled.

Stoneman's Point No. 18.

This Court properly refused to give Stoneman's point no. 18 for two reasons. First, the point includes a defini-

tion of specific intent which we covered elsewhere in the charge. We told the jury of the requirement of specific intent on numerous occasions throughout the charge. Second, in our view, the first sentence of the proposed point, "Defendant has offered evidence that he did not know that his conduct was unlawful," was improper.

Stoneman's Point No. 21 and Supplemental Point No. 6.

This Court was not obliged to give Stoneman's point no. 21 and supplemental point no. 6 dealing with attorney-client privilege in the language proposed. We instructed the jury that this privilege exists and explained the circumstances under which it can be invoked. Additionally, Stoneman's supplemental point no. 6 contains improper statements of fact which might have misled the jury in its understanding of the applicable law regarding attorney-client privilege.

Stoneman's Supplemental Point No. 3.

Stoneman argues that our refusal to give the following point entitles him to a new trial:

> Any admission or incriminatory statement made or act done outside of court by a co-defendant (or others) after June 22, 1984 (July 5, 1984), may not be considered as evidence against any person who is not present and did not hear the statement made or see the act done.

Stoneman's Supplemental Point No. 3. This point clearly presumes that the conspiracy ended on June 22, 1984 when the last mailing occurred, or on July 6, 1984 when the F.B.I. executed a search warrant on the residence of John Torquato, Jr. We did not give Stoneman's supplemental point no. 3 because it was not applicable to the facts of this case. The indictment in United States vs. Stoneman alleges that the conspiracy began on or about January 1, 1983 and continued up to the date of the

indictment which was October 22, 1984. This Court properly instructed the jury that:

> A conspiracy ends when its principal objective is accomplished, when it is abandoned, or when otherwise terminated by some affirmative act. Any agreement to conceal a completed crime made after a crime is committed does not — let me emphasize — does not extend the life of a conspiracy.
>
> Therefore, I charge you that in the absence of an express initial agreement to conceal between the conspirators, you may not find a Defendant guilty of a conspiracy from the mere fact that he agreed to conceal a completed crime or engaged in acts of concealment following the completion of the crime.

Transcript, Volume 40, p. 152. We properly instructed the jury regarding termination of a conspiracy; therefore, Stoneman's argument is without merit.

Stoneman's Supplemental Point No. 5.

Stoneman argues that he is entitled to a new trial because of this Court's refusal to give his supplemental point no. 5 which reads as follows:

> Ordinary citizens have no duty or obligation to respond to questions asked by the Federal Bureau of Investigation or to volunteer information to the Federal Bureau of Investigation. I charge you that you may not infer guilt or draw any other adverse inference from Mr. Stoneman's failure to fully and completely respond to questions asked by the Federal Bureau of Investigation or to volunteer answers beyond the questions themselves.

We did not give this point for several reasons. First, the cases cited by Stoneman as authority for giving this point are not controlling in this circuit, and Stoneman cited no

binding authority for the proposition that his supplemental point is a correct statement of the law. Second, the point was not given because it was not applicable to the facts in this case; Stoneman participated in a "cooperative interview" with agents of the Federal Bureau of Investigation during which he gave misleading and untruthful answers to questions. The point contains a theory not supported by the evidence. *United States v. Bertucci*, 333 F.2d 292 (3d Cir. 1964). Stoneman was not prejudiced by this Court's refusal to give his supplemental point no. 5.

Stoneman's argument for a judgment of acquittal or for a new trial on the basis that we improperly instructed the jury is without merit.

VIII.

THE DISCHARGE OF JUROR BARR.

Stoneman objected to the discharge of a juror prior to the commencement of deliberations. In his brief in support of his motion for a new trial, Stoneman relies upon the arguments raised during the trial; however, defense counsel presented no legal arguments as to why Mrs. Barr should continue to serve but simply stated that it was not likely that she would continue to deliberate for such a length of time as to interfere with her vacation plans. Transcript, Volume 40, p. 178. Juror Barr had a prepaid vacation that was to commence on Wednesday, June 19, 1985. The jury was expected to commence deliberations on Friday, June 14, 1985. It was quite possible that the other jurors knew that juror Barr had scheduled a pre-paid vacation and would be unable to obtain a refund in the event that deliberations lasted more than a few days. The case had been tried for 40 trial days and it was likely that the deliberations would also be lengthy. Retaining the juror would have placed a heavy burden on

the juror in question and also on her fellow jurors to arrive at a verdict before the commencement of the vacation. The verdict was actually returned on June 24, 1985. To have declined to excuse juror Barr would have been foolhardy. We exercised our discretion properly and substituted an alternate juror to prevent any prejudice to the Defendants. Stoneman's argument regarding the discharge of juror Barr is without merit.

IX.

THE ELEVEN-PERSON JURY.

Stoneman challenges, as did Defendant Smith in his post-trial motions, the constitutionality of this Court's permitting the return of a verdict by 11 jurors. We have already addressed this argument in section VIII of our opinion and order of October 17, 1985 in U.S. vs. Smith. In that opinion, we held that Rule 23(b) of the Federal Rules of Criminal Procedure is constitutional. Our reliance upon Rule 23(b) did not violate Stoneman's rights under the Sixth Amendment or under Article III, Section 2 of the United States Constitution. We incorporate section VIII of our said opinion in *Smith* herein by reference.

X.

DENIAL OF PRE-TRIAL AND OTHER MOTIONS.

Included in his list of reasons for acquittal and for a new trial, Stoneman mentions several items which he does not address in his post-trial briefs. Since these contentions are not addressed in a post-trial brief, and since we have already carefully considered them when raised and find them to be without merit, we will not address them here. We adhere to our reasoning and rulings as stated in

prior orders of this Court, both written and oral, regarding the following matters raised by counsel:

1. The Court's Denial of Stoneman's Pre-trial Motion for Bill of Particulars.

2. The Court's Denial of Stoneman's Pre-trial Motion to Dismiss.

3. The Court's Denial of Stoneman's Motion to Suppress the Testimony of John R. Torquato, Jr.

4. The Court's Denial of Stoneman's Motion to Enforce the Subpoena and Produce the Medical Records of John R. Torquato, Jr. and Judy Ellis.

5. Stoneman's argument that this Court improperly denied Stoneman's Motion during trial to compel the Government's Disclosure of Brady material of witnesses interviewed by the Federal Government and from whom exculpatory information was obtained and that this Court improperly failed to review these statements "in camera" prior to our adverse ruling thereon.

6. The Court's allowance of rebuttal testimony.

The grounds listed by Stoneman in his post-trial motions viewed individually and in total do not form the basis for the entry of the judgment of acquittal or for awarding Stoneman a new trial.

An appropriate order will be entered.

/s/ MUIR,
U.S. District Judge

DATED: October 18, 1985

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
ALAN R. STONEMAN

Criminal No. 84-00156-05

(Judge Muir)

Donald R. Berry, Clerk

Filed: October 18, 1985

ORDER

1. Alan R. Stoneman's motion for arrest of judgment is denied.

2. Alan R. Stoneman's motion for judgment of acquittal is denied.

3. Alan R. Stoneman's motion for a new trial is denied.

MUIR, *U.S. District Judge*

DATED: October 18, 1985

APPENDIX D

VI.

TRIAL

Rule 23. Trial by Jury or by the Court

(a) *Trial by Jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) *Jury of Less Than Twelve.* Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

(c) *Trial Without a Jury.* In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Section 2, Clause 3. Criminal Trial by Jury.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign comnmerce, including the mail, with intent to

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses

in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Subpart E — Court Orders

§ 2.61 Legal effect of order — Rules.

Subsection (b)(2)(C) of the sections which authorize this part (21 U.S.C. 1175 and 42 U.S.C. 4582) empowers the courts, in appropriate circumstances, to authorize

disclosures which would otherwise be prohibited by subsection (a) of those sections. Subsection (b)(2)(C) operates only as a mechanism for the relief of the duty imposed by subsection (a) and not as an affirmative grant of jurisdiction to authorize or compel disclosures prohibited or privileged by other provisions of law, whether Federal or State. An order or provision of an order based on some other authority, or a subpoena, or other appropriate legal process, is required to compel disclosure. To illustrate, if a person who maintains records subject to this part is merely requested, or is even served with a subpoena, to disclose information contained therein in a manner prohibited in the absence of a court order, he must refuse such a request unless, and until, an order is issued under subsection (b)(2)(C). Such an order would remove the prohibition, but could not, of its own force, require disclosure. If there were no subpoena or other compulsory process, or a subpoena had been issued but had expired or been quashed, the custodian of the records would have discretion as to whether to disclose the information sought unless and until disclosure were ordered by means of appropriate legal or administrative process, the authority for which would have to be found in some source other than subsection (b)(2)(C) of the sections authorizing this part.

§ 2.63 Limitation to objective data — Rules.

(a) *Limitation to objective data.* Except as provided in paragraph (b) of this section, the scope of an order issued pursuant to this subpart may not extend to communications by a patient to personnel of the program, but shall be limited to the facts or dates of enrollment, discharge, attendance, medication, and similar objective data, and may include only such objective data as is necessary to fulfill the purposes for which the order is issued.

(b) *Exception.* When a patient in litigation offers testimony or other evidence pertaining to the content of his communications with a program, an order under this subpart may authorize the submission of testimony or other evidence by the program or its personnel.

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§ 3771. *Procedure to and including verdict*

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May,

and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 22, 1986, I served the within Petition for a Writ of Certiorari in re: "Alan R. Stoneman -v- United States of America" in the United States Supreme Court, October Term 1986, No. .....;

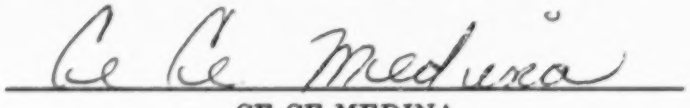
on the parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

James J. West, Esquire
Assistant United States Attorney
228 Walnut Street
Harrisburg, PA 17108
Attorney for Respondent

All parties required to be served have been served.

I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Executed on July 22, 1986, at Los Angeles, California



CE CE MEDINA

(2) (2)

Nos. 86-100 and 86-111

FILED
NOV 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM T. SMITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ALAN R. STONEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

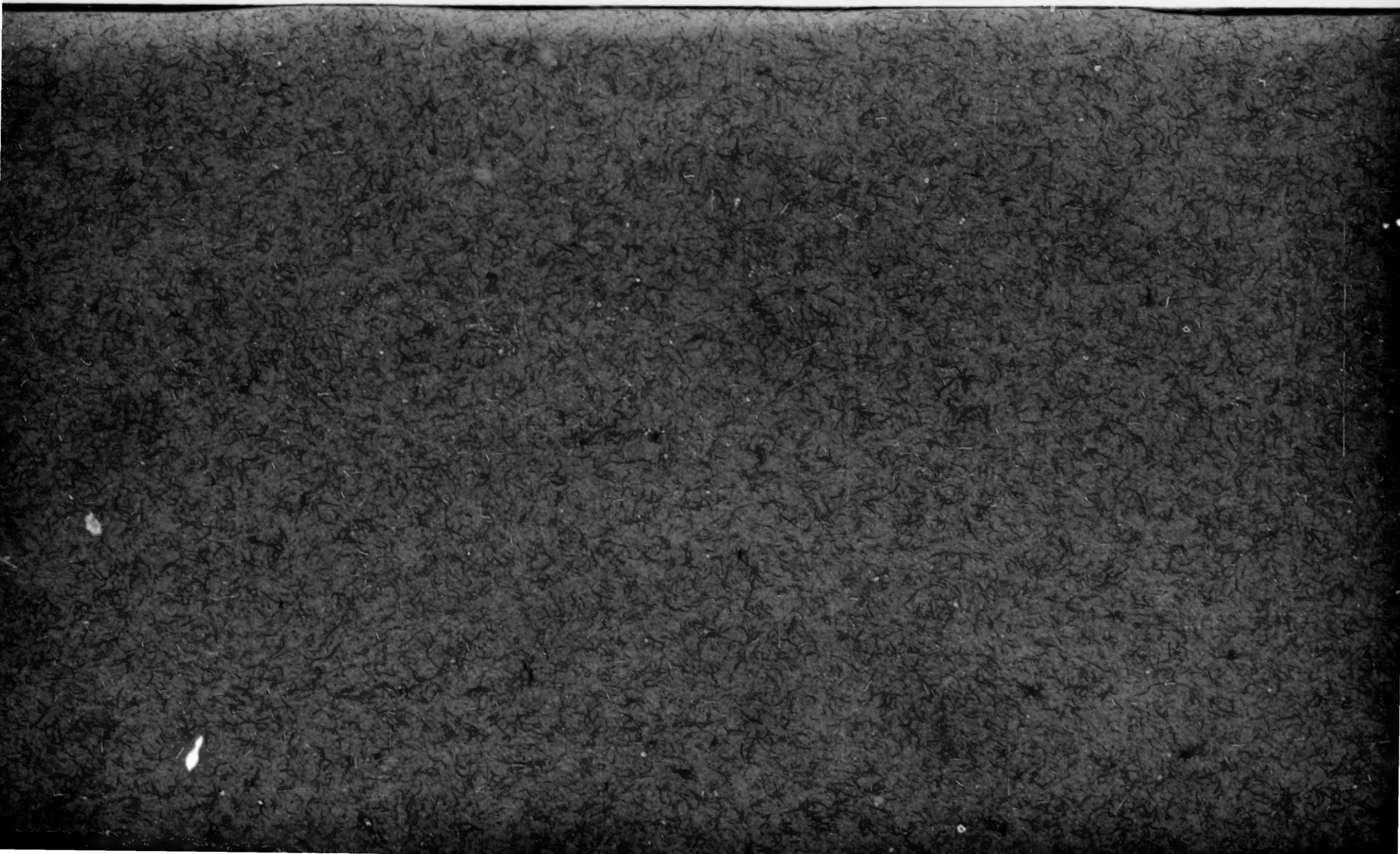
BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

MERVYN HAMBURG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp



QUESTIONS PRESENTED

1. Whether Fed. R. Crim. P. 23(b), which authorizes a district court to excuse a juror for just cause after deliberations have begun and to allow the 11 remaining jurors to return a verdict, is constitutional (Nos. 86-100, 86-111).

2. Whether the district court's supplementary instructions introduced a new theory of criminal liability (No. 86-100).

3. Whether the district court committed reversible error when it refused to order production of certain confidential medical records of the principal government witness (No. 86-111).

4. Whether the district court committed reversible error when it denied petitioner Stoneman's severance motion (No. 86-111).

TABLE OF CONTENTS

	Page
Questions presented	I
Opinion below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Rugendorf v. *United States*, 376 U.S. 528	10
United States v. *Acosta*, 763 F.2d 671, cert. denied, No. 85-5312 (Oct. 7, 1985)	11
United States v. *Graham*, 548 F.2d 1302	10
United States v. *Stratton*, 779 F.2d 820, certs. denied, No. 85-6741 (June 2, 1986)—No. 85-1919 (June 23, 1986)	7, 8
United States v. *Walker*, 720 F.2d 1527, cert. denied, 465 U.S. 1108	11
Williams v. *Florida*, 399 U.S. 78	7

Statutes and rules:

18 U.S.C. 371	2
18 U.S.C. 1341	2
18 U.S.C. 1952	2
18 U.S.C. 3771	8
42 U.S.C. 290dd-3	9
Fed. R. Crim. P.:	
Rule 8(b)	10
Rule 23	8
Rule 23(b)	6, 7, 8
Rule 31(a)	8

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-100

WILLIAM T. SMITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-111

ALAN R. STONEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 789 F.2d 196.[1]

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-100.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1986. Petitions for rehearing were denied on May 23, 1986 (86-100 Pet. App. 54a-55a; 86-111 Pet. App. B1). The petition for a writ of certiorari in No. 86-100 was filed on July 12, 1986, and the petition in No. 86-111 was filed on July 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners were convicted of conspiracy to commit mail fraud and to travel interstate in aid of racketeering, in violation of 18 U.S.C. 371. Petitioner Smith was also convicted on four counts of mail fraud and four counts of use of an interstate facility to promote acts of bribery, in violation of 18 U.S.C. 1341 and 1952, while petitioner Stoneman was acquitted on the substative counts. Smith with sentenced to 12 years' imprisonment and fined $63,000. Stoneman was sentenced to four months' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-24a).

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 4a-7a), showed that in 1983 and 1984 petitioners participated in a conspiracy to bribe public officials in order to obtain inflated contracts from the Commonmonwealth of Pennsylvania and its political subdivisions. The contracts at issue were contracts to prepare applications for the recovery of excess Social Security (FICA) taxes paid to the federal government. In early 1983, petitioner Smith, the Republican Party Chairman of Dauphin County, Pennsyl-

vania, began discussions with John Torquato, the son of a former Democratic Party Chairman for Cambria County, Pennsylvania, about how to obtain such contracts. Smith and Torquato agreed to make political contributions to officials who could influence the awarding of FICA recovery contracts. After enlisting the help of David Herbert, the State Director of Social Security, to identify potential sources of FICA recovery contracts, Smith and Torquato decided to concentrate on Allegheny County, the City of Pittsburgh, and the State government. The FICA recovery contracts for those entities were pursued from January 1983 through October 1984 with the assistance of petitioner Stoneman, who, like Smith, is a lawyer. Pet. App. 4a-5a.

a. In April 1983, a contract from Allegheny County was obtained by co-defendant CTA, Ltd., Inc., a corporation formed by petitioner Stoneman in November 1982. Petitioners also used CTA to buy influence with James Scanlon, the head of Allegheny County Computer Services, and with Eugene Scanlon (James' brother), the Minority Whip of the Pennsylvania Senate. They paid for a weekend trip to New York for James Scanlon and his family and offered him a $50,000 job with CTA. They offered Eugene Scanlon mailing lists for his daughter's business, the use of a rental car, payment of the cost of an airline ticket for a third Scanlon brother, and $100,000 to set up what Torquato called a "widget factory" in Hong Kong. Pet. App. 4a-5a.

On December 16, 1983, shortly after the contract with Allegheny County came to an end, Torquato sent Smith a check for $1,000 for his services, with a letter discussing how to increase their influence with Herbert. They agreed on a strategy, and on

January 5, 1984, Stoneman created a California corporation known as Com-Max. The conspirators' plan was to furnish Herbert and other officials with stock in Com-Max, which would increase in value if the officials used their influence and authority to award excessively profitable FICA recovery contracts to CTA or other companies associated with Com-Max. Pet. App. 5a.

Late in January, Stoneman sent 1,500 shares of Com-Max stock to Herbert and another 1,500 shares to the chief clerk of Allegheny County, promising to repurchase the stock in three years for at least $15,000. In September 1984, Allegheny County selected CTA for another FICA recovery contract, even though other companies had submitted much lower bids. The contract was signed by Torquato on Stoneman's behalf and by the chief clerk of Allegheny County. Pet. App. 5a.

b. The City of Pittsburgh entered into a $150,000 FICA recovery contract with CTA for the year beginning June 1983. CTA then hired an unsuccessful bidder for the contract to do the work for $35,000. CTA obtained the contract from the city by making payments to Robert Rade Stone, the President of the Pittsburgh City Council. Stone was given $6,374.86 in cash and options for 35,000 shares of Com-Max stock. Both payments were made through petitioner Stoneman. Profits from the FICA recovery contracts were to be used to increase the value of the Com-Max stock. Pet. App. 5a.

c. Petitioners' successful effort to obtain the FICA recovery contract for all Pennsylvania state employees began in early 1983. Smith and Torquato first offered money to Republican State Chairman Robert Asher. With his assistance, they obtained a hearing in the Governor's Office, which controlled

the award of the contract. When it appeared that the Governor's Office would not produce a contract for them, Smith and Torquato successfully undertook to have legislation enacted to transfer the contract-awarding power to Smith's long-time friend, State Treasurer R. Budd Dwyer. Senate Minority Whip Eugene Scanlon and House Majority Leader Jim Manderino helped in getting the legislation passed. The day the bill passed in the lower house, Torquato purchased $500 in tickets to a fund-raising event sponsered by Manderino. Pet. App. 6a.

On May 10, 1984, the Treasurer, after discussions with Smith and Torquato about a $300,000 payment, awarded the Pennsylvania contract to Computer Technology Associates, Inc., a Pennsylvania corporation that Smith and Torquato had formed the previous month. Out of the $6 million price of the contract, Smith and Torquato were to receive $4 million in profits. The afternoon the contract was awarded, Torquato met with Herbert and offered him $100,000 to be deposited in a Swiss bank account. Pet. App. 6a.

Smith immediately sought a legal ruling from the Attorney General of Pennsylvania that the contract was exclusive. Through the Attorney General's Press Secretary, Smith offered to provide $100,000 for the Attorney General's reelection campaign. The Attorney General ruled that the Treasurer's Counsel could decide the issue, and the Treasurer's Counsel subsequently ruled that the contract was exclusive. Pet. App. 6a-7a.

In June 1984, shortly after securing the lucrative state contract, Smith and Torquato, with Stoneman's knowledge, formed a new corporation to try to hide the connection between Com-Max and Computer Tech-

nology Associates, Inc. An investigation commenced soon thereafter. A search of Torquato's home produced records of payments to various public officials, including Dwyer, Herbert, Eugene Scanlon, and Stone. The state contract was voided. An accounting firm eventually performed the work required by the $6 million contract for between $845,000 and $1,300,000. Pet. App. 7a.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-24a). The court upheld the district court's decision to allow jury deliberations to go forward with 11 jurors after one of the deliberating jurors became disabled by a car accident on the fourth day of deliberations (Pet. App. 18a-19a). The court of appeals held that Fed. R. Crim. P. 23(b), which permits a district court to proceed with a jury of 11 in such circumstances, is not unconstitutional. The court also rejected petitioners' contention that the district court had introduced a new theory of liability on the conspiracy count when the court gave the jury a supplemental instruction on the issue of multiple conspiracies (Pet. App. 10a-14a). The court of appeals further held that petitioners' constitutional rights were not impaired by the trial court's refusal to order the production of the confidential alcoholism-treatment records of John Torquato, who was the government's chief witness and whose admitted alcoholism was the subject of his own and others' testimony (Pet. App. 19a-21a). Finally, the court of appeals upheld the district court's denial of petitioner Stoneman's motion for severance. The court concluded that Stoneman had suffered no prejudice, because the jury could readily separate the evidence presented against each of the two defendants (Pet. App. 21a-22a).

ARGUMENT

The decision of the court of appeals is correct, it raises no signficant issue of federal law, and it does not conflict with decisions of this Court or of other courts. Accordingly, further review by this Court is not warranted.

1. Petitioners challenge (Smith Pet. 11-14; Stoneman Pet. 8-14) their convictions by an 11-person jury as unconstitutional. On the fourth day of jury deliberations, after a trial of almost three months, one of the deliberating jurors was injured in an automobile accident and could no longer participate in the deliberations. Over petitioners' objections, the district court directed the jury to continue deliberations with only 11 members. That course was authorized by a 1983 amendment to Fed. R. Crim. P. 23(b), which permits an 11-person jury if the district court finds it "necessary to excuse a juror for just cause" after deliberations have commenced. The jury thereafter reached a unanimous verdict.

Petitioners' argument that Rule 23(b) is unconstitutional is meritless. The only other federal court to consider the question readily concluded, as the Third Circuit did here, that the provision is constitutional. *United States* v. *Stratton*, 779 F.2d 820, 830-835 (2d Cir. 1985), certs. denied, Nos. 85-6741 and 85-1919 (June 2 and 23, 1986). That conclusion is correct. The Constitution does not require 12 jurors for conviction. *Williams* v. *Florida*, 399 U.S. 78 (1970). Conviction by an 11-person jury is no less valid because the jury began with 12 members. There is a strong public interest in completing a trial, like petitioners', that has consumed vast public resources; and reducing the jury from 12 to 11 in no way impairs the interest of a defendant in a jury

that is fair, impartial, and deliberative.[2] The provision of Rule 23(b) that authorizes such a reduction —in the district court's "discretion," but only when it is "necessary" and there is "just cause"—was properly promulgated by this Court pursuant to 18 U.S.C. 3771 and is a sensible solution to a problem that arises rarely and unpredictably. See Advisory Committee Notes to Fed. R. Crim. P. 23; *United States* v. *Stratton*, 779 F.2d at 831-833.

2. Petitioner Smith challenges (Smith Pet. 8-11) certain supplemental jury instructions, which he claims altered the theory of liability from the one set forth in the indictment. The trial court initially instructed the jury on the distinction between a single conspiracy and multiple conspiracies in accordance with the proposed instruction that had been discussed at the charging conference. See Pet. App. 10a-11a (quoting instruction). The next day, believing there to be some confusion, the trial court gave a supplemental instruction on the same point. See Pet. App. 11a-12a (quoting supplemental instruction). In the court of appeals, petitioners argued that the supplemental instruction introduced a new theory of liability by permitting conviction for multiple conspiracies. The court of appeals rejected that argument (Pet. App. 10a-14a), correctly concluding that the supplemental instruction merely

---

[2] Contrary to petitioners' contention, the provision of Rule 23(b), Fed. R. Crim. P., permitting an 11-person jury does not conflict with the provision of Rule 31(a), Fed. R. Crim. P., requiring that the jury's verdict be unanimous. After a court has authorized deliberations to continue with an 11-person jury, the remaining 11 jurors must still be unanimous in their verdict. Petitioners' suggestion that there is no difference between a unanimous 11-person verdict and a non-unanimous 12-person verdict is specious.

clarified the original instruction and still required the jury to find a single conspiracy in order to convict. Neither petitioner challenges the contents of the supplemental instruction in this Court.

Petitioner Smith, however, challenges two different supplemental instructions (see Smith Pet. 10) on the same ground—that they allowed the jurors to "convict on the conspiracy even if they found three separate schemes involving different people in an undefined relationship to a master conspiracy" (Smith Pet. 11). This contention is patently devoid of merit. The instructions to which Smith now objects were not the ones that were the focus of petitioners' challenge below. Moreover, the two instructions on which petitioner Smith now focuses relate only to the substantive mail fraud counts of the indictment, not to the conspiracy count. The challenged instructions thus have no bearing on the distinction between single and multiple conspiracies.

3. Petitioner Stoneman challenges (Stoneman Pet. 14-18) the denial of access to certain medical records that he sought in order to impeach the government's chief witness, John Torquato. Torquato had attended an alcoholism-treatment program. Petitioners, seeking to impeach his credibility, moved for production of Torquato's records from that program, which are confidential, absent "good cause," under the federal statute protecting the secrecy of the records of drug-rehabilitation programs. 42 U.S.C. 290dd-3. The trial court and the court of appeals both concluded that the "good cause" exception did not apply and that the Constitution did not require disclosure (Pet. App. 20a-21a, 46a).

Petitioner Stoneman argues that his due process rights were violated by the unavailability of the re-

quested medical records. The court of appeals' rejection of that argument is both correct and inherently fact-specific. Torquato admitted his alcoholism, and both he and other witnesses were subjected to extensive cross-examination on the subject (Pet. App. 20a-21a, 46a). The records would have "only marginally" helped impugn Torquato's credibility, yet their disclosure would have "severely prejudice[d] [the] public interest requiring confidentiality" (Pet. App. 21a). In these circumstances, petitioner Stoneman was not unlawfully hindered in his ability to challenge the case against him. See *United States* v. *Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977); cf. *Rugendorf* v. *United States*, 376 U.S. 528 (1964) (disclosure of informer's identity subject to balancing test).

4. Petitioner Stoneman finally argues (Stoneman Pet. 18-24) that the district court's refusal to sever his case from that of petitioner Smith denied him a fair trial. The court of appeals correctly held that denial of the severance motion was within the district court's discretion (Pet. App. 21a-22a). Petitioners were properly tried together because they were charged with the same conspiracy (*id.* at 22a). See Fed. R. Crim. P. 8(b). Moreover, there is ample support for the court of appeals' conclusion that Stoneman was not prejudiced because the jury was able to "compartmentalize the evidence against each defendant" (Pet. App 22a). The jury had before it only two individual defendants. Petitioner Stoneman's role in the criminal activity (chiefly sending stock certificates and forming corporations) was clearly distinguished at trial from Smith's role (making direct approaches to public officials). The jury was instructed that Stoneman's participation in the con-

spiracy must be proved by his own acts and statements. And the acquittal of petitioner Stoneman on the substantive counts, together with the conviction of Smith on some of those counts, indicates that the jury could and did carefully sift the evidence against each defendant separately. See, *e.g.*, *United States* v. *Acosta*, 763 F.2d 671, 697 (5th Cir.), cert. denied, No. 85-5312 (Oct. 7, 1985); *United States* v. *Walker*, 720 F.2d 1527, 1533-1535 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

MERVYN HAMBURG
Attorney

NOVEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40098

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-111

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ALAN R. STONEMAN,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S BRIEF IN REPLY

BROWM & MARTINEZ
JOHN BROWN, ESQ.
CHRISTIAN MENARD, ESQ.
500 Esplanade Drive
Suite 1200
Oxnard, CA 93030
(805) 983-2238
Attorneys for Petitioner
Alan R. Stoneman

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

15 pp

TABLE OF CONTENTS

	Page
NEW ISSUES RAISED BY THE BRIEF OF THE SOLICITOR GENERAL	1
I.	
THE SOLICITOR GENERAL BLARINGLY MISCONCEIVES THE HOLDING OF *U.S. V. STRATTON* AS THAT CASE NEVER RULED ON THE CONSTITUTIONAL ISSUES RAISED BY PETITIONER	2
II.	
THE SOLICITOR GENERAL GROSSLY MISSTATES THE EVIDENCE AND SETS FORTH FACTS NOT CONTAINED IN THE RECORD	5
III.	
THE SOLICITOR GENERAL'S MISCONSTRUCTION OF CODE OF FEDERAL REGULATIONS, TITLE 42, SECTIONS 2.61, ET SEQ., 42 SECTION 2.63 REQUIRES THIS COURT TO DETERMINE WHAT PUBLIC INTERESTS ARE PROTECTED THEREBY	8
CONCLUSION	10

TABLE OF AUTHORITIES CITED

Cases

	Page
Davis v. Alaska, 415 U.S. 308 (1974)	9
Patton v. United States, 281 U.S. 276, 298, 50 S.Ct. 253 (1930)	3
United States v. Gambino, 598 F.Supp. 646, 660 (1984)	2
United States v. Richard Lowell Stratton, 779 F.2d 820 (2d Cir. 1985)	1, 2, 3
United States v. Scalzitti, 578 F.2d 507 (3d Cir. 1978)	4
Williams v. Florida, 399 U.S. 78 (1970)	2, 3
Williamson v. United States 310 F.2d 192, 198 (9th Cir. 1962)	7

Statutes

18 U.S.C., Section 3771	5
42 C.F.R. Section 2.61	1, 8
42 C.F.R. Section 2.63	
Federal Rule of Criminal Procedure, Rule 23(b)	2, 3, 5, 10

No. 86-111

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ALAN R. STONEMAN,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S BRIEF IN REPLY

NEW ISSUES RAISED BY THE BRIEF OF THE SOLICITOR GENERAL

Petitioner, mindful of Rule 22.5 of the Rules of the Supreme Court of the United States, contends the brief of the Solicitor General raises new issues by: (1) mischaracterizing and relying on facts not supported by the evidence; (2) mischaracterizing the factual and legal issues disposed of by *United States v. Stratton,* 779 F.2d 820 (2d Cir. 1985), requiring this Court to lay to rest the constitutional issues as raised by Petitioner; and, (3) by misconstruing Code of Federal Regulations, Title 42, Section 2.61, et seq., 42 Section 2.63 raising the issue of whether that regulation protects the interests claimed by the Solicitor General.

I.

THE SOLICITOR GENERAL BLARINGLY MISCONCEIVES THE HOLDING OF *U.S. V. STRATTON* AS THAT CASE NEVER RULED ON THE CONSTITUTIONAL ISSUES RAISED BY PETITIONER.

Petitioner's trial started with an original cross-section of 12 jurors, ending with a cross-section of only 11. The Solicitor General claims that "the only other federal court to consider the question, as the Third Circuit did here, that the provision (Rule 23(b)) is constitutional" was *United States v. Stratton,* supra.[1] (Brief in Opposition, pp. 7-8). However, the Solicitor General misinterprets *Stratton,* which relied upon *Williams v. Florida,* 399 U.S. 78 (1970). However, Petitioner's is not a *Williams* case! Nor are the issues raised by Petitioner those considered, let alone decided by *Williams.*

These cases did not discuss the novel issues of first impression raised by Petitioner. The interpretation of *Stratton* by the Solicitor General raises such an important federal question that a ruling by this Court is essential to settle the contitutional issues raised by Petitioner and the Solicitor General regarding the discretionary aspect of Rule 23(b) and its material impairment of a defendant's constitutional substantive rights.

Stratton only discussed the appropriate number for a selected constitutional jury. However, Petitioner does not claim, as contended by the Solicitor General, that a constitutional jury requires the magic number of 12. Petitioner contends that whatever number of jurors a trial begins with, *that* number *then* becomes magic because any reduction of *that* number destroys the unanimity of

---

[1]The Solicitor General apparently disagrees with the 3d Circuit Court of Appeals claim that *U.S. v. Gambino* 598 F. Supp. 646 (D.N.J. 1984) held Rule 23(b) constitutional.

the verdict through the loss of the original cross-section of the community from which the jury was originally selected. The balance of the representative cross-section of the community in which the case is tried becomes unconstitutionally altered. *Stratton,* like *Williams,* did not discuss, let alone determine, such issues nor stand for the proposition cited by the Solicitor General and the court of appeals.

Petitioner contends that there is a significant import to the originally selected cross-section comprising a jury, regardless of whether that number be 6, 9 or 12. In *Williams,* the defendant started his trial with 6 jurors and presumably selected his cross-section of jurors accordingly. Mr. Williams did not lose the unanimity of that original cross-section. Petitioner did and the unanimity of his original jury's nature was significantly altered.

The Solicitor General wants this Court to believe such issues were raised and determined by *Stratton*, when, in fact, they were not. The Solicitor General's contention that *Stratton* held Rule 23(b) constitutional, is misleading and an improper bootstrap technique to determine such an important novel federal question of first impression and unconstitutionally affects Petitioner's substantive rights.

Petitioner has a contitutional substantive right to the unanimous vote of the original cross-section of jurors that he selected in starting his trial. Such issue is separate and distinct from that of a unanimous vote of the remaining jurors as suggested by the Solicitor General.

This vital and important concept of unanimity of the original cross-section was recognized by this Court in *Patton v. United States*, 281 U.S. 276, 298, 50 S.Ct. 253 (1930) in which it was held:

> "Not only must the right of the accused to a trial by constitutional jury be zealously preserved but the *maintenance of the jury as a fact finding body* in criminal cases *is of such importance* and has such a place in our tradition that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had *in addition to the express and intelligent consent of the defendant.*" [emphasis added].

Under the presumption of innocence guaranteed by our Constitution, Petitioner must be given the benefit of any doubt as to the prejudice he suffered by the loss of his 12th juror who had her own opinions, consideration and effect on the other jurors. These considerations are inherent in Petitioner's most important constitutional substantive right to a trial by jury. This salient aspect of the jury system was recognized by the Third Circuit Court of Appeals when it observed in *United States v. Scalzitti,* 578 F.2d 507 (1978);

> "Unanimity serves to effectuate the purpose of the jury system by promoting the *full expression of the views of all members of the jury and by insuring that those views are taken into account as fully and thoroughly as possible in reaching a verdict . . .*" [emphasis added].

The Solicitor General relies upon the "strong public interest in completing a trial, like petitioner's, that has consumed vast public resources" (Brief in Opposition, p. 7). Such raises the factual issue of which portions of those "vast resources" were devoted to the government's case against Petitioner, as opposed to Smith, and further demonstrates the prejudice suffered by Petitioner in having to be co-tried with Smith. Had Petitioner been separately tried, his trial, like that of Robert Stone's separate trial, would not have lasted but approximately two weeks.

The "vast public resources" consumed in Petitioner's co-trial dealt with issues with which Petitioner had no involvement. The principles of judicial economy should never take precedence over one's basic constitutional right to seek Justice.

This Court must consider the issues raised by Petitioner, as well as those new issues raised by the Solicitor General in its brief vis-a-vis this Court's rule making authority granted it by 18 U.S.C. 3771. As herein-above pointed out, Petitioner's affected rights were substantive not procedural. It can be inferred that this Court merely overlooked the nature of the rights it sought to affect in amending Rule 23(b). For the sake of Justice, the potential for misuse of Rule 23(b), as occurred to Petitioner, ought be re-examined.

II.

THE SOLICITOR GENERAL GROSSLY MISSTATES THE EVIDENCE AND SETS FORTH FACTS NOT CONTAINED IN THE RECORD.

It is easy for the Solicitor General to say that the jury easily compartmentalized the evidence. However, the trial judge, the court of appeals, and even the Solicitor General are not able to do so. The Solicitor General's brief is replete with misstatements of evidence nowhere contained in the record. Such reflects the prejudice suffered by Petitioner in being forced into a co-trial with Smith. Specifically, the solicitor General erroneously claims:

> (1) "The contract was signed by Torquato on Stoneman's behalf" (Brief in Opposition, p.4). Such statement even conflicts with the court of appeals "finding" that "Stoneman executed the contract on behalf of CTA, Ltd.", Appendix A, slip op. at 4. In Truth, Petitioner DID NOT execute the contract.

Torquato admitted that Petitioner did not draft it nor sign it as it was only sent to Petitioner *after* the work on the contract had been completed;

(2) "The conspirator's plan was to furnish Herbert and other officials with stock in Com-Max which would increase in value if the officials used their influence and authority to award excessively profitable FICA recovery contracts to CTA or other companies associated with Com-Max. (Brief in Opposition, p. 4). Again there is discrepancy with the "finding" of the court of appeals which stated: "some of the profits from the FICA contracts were to be used to make the Com-Max stock valuable and, therefore, to benefit the public officials who were given Com-Max stock and stock options." Appendix A, slip op. at 5. In Truth, the evidence proved the profits from the only two completed contracts were not so used;

(3) "An Accounting firm eventually performed the work required by the $6 million contract for between $845,000 and $1,300,000" (Brief in Opposition, p. 6). The court of appeals however "found" that "The contract was ultimately performed by an accounting firm, Levin-Horwith, for $1,300,000", Appendix A, slip op. at 6. In Truth, the evidence proved: no firm, let alone Levin-Horwith, performed the contract and to this day that contract has never been performed;

(4) "Smith and Torquato, with Stoneman's knowledge, formed a new corporation to try to hide the connection between Com-Max and Computer Technology Associates, Inc." (Brief in Opposition, pp. 5-6). However, there was absolutely no evidence to even suggest Petitioner was aware of that corporation formed by Smith in June of 1984. The Solicitor General's misunderstanding of the evidence differs

> from the misunderstanding of the court of appeals which stated: "Stoneman .... did not file the corporate documents that would have identified the officers of the corporation and disclose its connection to CTA, Ltd." Appendix A, slip op. at 5.

In Truth, Petitioner DID FILE all documents he was permitted by California law to file which, in fact, publicly connected Com-Max, Inc. to CTA, Ltd. Petitioner was named in those documents as the incorporator and initial agent for service of process, giving the State of California jurisdiction over Com-Max, Inc. as well as identifying Petitioner's association with it. As Petitioner was also a publicly disclosed officer of XET, Ltd. dba CTA, Ltd. this fact created and disclosed Com-Max's connection with CTA, Ltd.! A documented connection the Solicitor General and court of appeals state did not exist!

It is clear: when evidence is relatively uneasy to follow and lacks straight-forwardness, the more difficult it becomes for evidence to be compartmentalized by the jury. *Williamson v. United States* 310 F.2d 192, 198 (9th Cir. 1962). The case against Smith and Petitioner lasted 3 months in which 106 witnesses testified. These logistical facts alone raise serious doubt as to the straight-forwardness and relative ease with which the evidence was presented and absorbed by the jury.

That Petitioner was acquitted of 15 substantive counts, while Smith was convicted of several, is not dispositive nor persuasive that the jury understood and easily marshalled the evidence pertaining to him. The record reflects the jury's extreme state of confusion on the charges given them pertaining to the laws of conspiracy for which they sought clarification on 3 separate occasions. Had they easily marshalled and understood the evidence as claimed by the Solicitor General and court of appeals, then logically Petitioner could not have been acquitted of Count B

for his overt actions which allegedly formed the basis of his participation in the conspiracy. This blatant incongruity demonstrates the jury's inability to place the evidence in its proper "compartment".

Whether the allegation of conspiracy against Petitioner was made in "good faith", and thereby a "sufficient reason for trying the conspiracy and all substantive offenses together", is seriously questionable. The record reveals Petitioner was not even going to be indicted. A separate trial would have only lasted approximately two weeks. Importantly, a separate trial would have been a Fair trial. Truth would not have been buried as it was in his protracted and convoluted co-trial.

III.

THE SOLICITOR GENERAL'S MISCONSTRUCTION OF CODE OF FEDERAL REGULATIONS, TITLE 42, SECTIONS 2.61, ET SEQ., 42 SECTION 2.63 REQUIRES THIS COURT TO DETERMINE WHAT PUBLIC INTERESTS ARE PROTECTED THEREBY.

The Solicitor General posits that 42 U.S.C. 2.61, et seq. 42 SECTION 2.63 is based upon "the public interest requiring confidentiality" (Brief in Opposition, p. 10). However, a reading of Section 2.61 clearly indicates that the public's interest is for *disclosure*, not non-disclosure! This interest and need for disclosure is to be weighed against the injury to *the patien*, the physician-patient relationship and the treatment services that could result upon *unconsented* disclosure.

In the case at Bench, the patient (Torquato) clearly and unequivocally waived any such interests he had and consented to their disclosure! The Solicitor General, as did the court of appeals, misconstrues the interest to be protected and balanced against. Petitioner's need for

disclosure of all relevant and material information which might have shed light on Torquato's state of mind and memory during the pertinent time-frame of his scheme clearly prevails in any weighing test. The scales of Justice clearly tips in the direction of disclosure.

Petitioner demonstrated "good cause" for disclosure even though the trial court denied him the opportunity to make a clearer showing when it refused to conduct an in-camera inspection of those medical records as Petitioner requested during trial. Because those records were never viewed, the Solicitor General, as did the court of appeals, speculates they "would have only marginally helped impugn Torquato's credibility". Does our legal system now dispense Justice by assuming what is Truth?

The Solicitor General rejects Petitioner's claim that he was denied his constitutional right to compulsory due process on the grounds that the court of appeals' similar rejection was "fact-specific". Such a position raises the issue of the right of compulsory due process being indistinguishable from the right of confrontation. However, such a contention fails to follow the distinction between those rights as stated by this Court in *Davis v. Alaska* 415 U.S. 308 (1974).

Petitioner's only involvement in this case was his performing acts normally requested of attorneys by their small business clients. Torquato was the only witness who testified that those otherwise innocent acts were performed with full knowledge of their unlawful object. Petitioner had a right to present all relevant and material evidence that could possibly have demonstrated the basis for Torquato's inherently incredulous testimony on this issue. Such evidence might have even shed light in explaining Torquato's ability to have materially altered his testimony as he did in the subsequent trial of Robert Stone, who was acquitted for taking the very items sent

him by Petitioner, which Torquato claimed, in the case at Bench, to have been bribery and for which Petitioner was convicted!

CONCLUSION

It is respectfully urged that this Court put a stop to the constant misstatements and misunderstanding of the evidence in this case as against Petitioner. The fact that the trial court, court of appeals and Solicitor General can not properly understand and compartmentalize the evidence demonstrates the jury's inability to have done so. Petitioner was denied Justice and deprived of his constitutional substantive rights. This Court must review Rule 23(b) in light of the issues raised by Petitioner and which have never been decided.

Respectfully submitted,

JOHN BROWN, ESQUIRE
CHRISTIAN MENARD, ESQUIRE

By: JOHN BROWN
BROWN & MARTINEZ
500 Esplanade Drive
Suite 1200
Oxnard, California 93030
Attorneys for Petitioner,
Alan R. Stoneman

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 10, 1986, I served the within Petitioner's Brief in Reply in re: "Alan R. Stoneman v. United States of America" in the United States Supreme Court October Term 1986 No. 86-111;

on the parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John Rodgers Carroll
Carroll & Carroll
615 Chestnut Street, Suite 1206
Philadelphia, Pennsylvania 19106

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 10, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA